In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE UNITED STATES, APPELLANT,
v.
GEORGE DEWEY, ADMIRAL U. S. NAVY, ETC. } No. 309.

GEORGE DEWEY, ADMIRAL U. S. NAVY, ETC.,
v.
THE "DON JUAN DE AUSTRIA," "ISLA DE CUBA," "Isla de Luzon," etc. } No. 310.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

As was anticipated in the brief for the United States (pp. 15–25), the brief of counsel for captors contends that the words "all captures made as prize" in section 4613, Revised Statutes, practically mean all captures made by a naval force, so that no captures made by a naval force of the United States, even on land, can inure to the benefit of the Government alone.

In addition to what has been said in the former brief, it may be noted that this contention really confounds "prize" and "capture." Every prize is a capture, just as every battle ship is a vessel, and every admiral is an officer; but the converse is no more true in one of these cases than in the others.

The term "capture" has a much broader meaning than "prize," as it covers every species of taking by either army or navy, where no compensation is contemplated. The following is a fairly complete definition:

> A capture, in technical language, is a taking by military power; a seizure, a taking by civil authority. (*United States* v. *Clark*, 35 Ga., 344, 351.)

A capture is "made as prize" when (and only when) it comes within the scope of the prize statutes as administered by the courts. The very words of section 4613, "all captures made as prize," intimate most clearly that there are other captures, and naval captures, too, which are not "made as prize."

The fundamental limitations of maritime prize can not be overthrown by any dictum culled from an opinion without reference to its context. Counsel for the captors (Brief p. 15–16) point to *Miller* v. *The Ship Resolution* (2 Dall., 1, 4), where it is said, "Prize is generally used as a technical term to express a legal capture," and they put this forward as conclusive that every legal capture is a prize. Now, the point before the court in that case was whether the original capture of a vessel and cargo by a British privateer (from whom they were subsequently captured by an American privateer) was legal or not; for if not, it had not changed the nationality of the captured property. The word "prize" had been used in the ordinance of Congress, and the court was pointing out that that word could not refer to an *illegal* capture. The idea that

every kind of legal capture was a prize was as far from the mind of the court as was the idea that every capture was legal; and it would be as reasonable to quote the dictum in support of the latter proposition as in support of the former.

In support of their theory that every species of property, wherever taken, captured by a naval force, is subject to adjudication in a court of admiralty, and therefore prize for the benefit of captors, counsel for captors (Brief, p. 64) quote a statement of the late Mr. Justice Gray, as follows:

> By the law of nations, as recognized and administered in this country, when movable property in the hands of the enemy, used, or intended to be used, for hostile purposes, is captured by land forces, the title passes to the captors as soon as they have reduced the property to firm possession; but when such property is captured by naval forces, a judicial decree of condemnation is usually necessary to complete the title of the captors. (*Oakes* v. *United States*, 174 U. S., 778, 786.)

The word "captors," where first used in the above sentence, obviously means "captor nation," because in this country a capture by land forces gives no private rights to those personally concerned in the taking; but where this word is used at the end of the sentence, it means, primarily at least, the persons concerned in the taking, the sense in which counsel, though arrayed against the captor nation, call themselves "counsel for captors." Whether Mr. Justice Gray, in using the word

the second time, intended it to refer to the captor nation at all is at least doubtful; but even if he did, the word "usually" implies that there are, though infrequently, cases of capture by a naval force where the title passes without a judicial decree of condemnation, and such cases, of course, are where the title passes to the captor nation and not to the individual captors.

What Mr. Justice Gray had in mind, however, is best seen by referring to the authorities which he cited in support of his statement. These are: 1 Kent's Commentaries, 102, 110; Halleck's International Law, c. 19, sec. 7; c. 30, sec. 4; and *Kirk* v. *Lynd* (106 U. S., 315, 317).

Those portions of Kent which are cited treat only of the question of the effect of a capture in divesting the captured property of the title of the original owner, and they only refer to an adjudication "when a prize is taken *at sea*." The cited portions of Halleck concern the rights of neutrals, and seem to bear but remotely on the subject. The opinion in *Kirk* v. *Lynd* does not expressly mention captures by naval forces, but uses language which would include them if made on land, for it says, "The title to movable property in hostile use, captured on land, passes to the captor as soon as it is complete; that is to say, as soon as the property is reduced to firm possession."

The conclusion to be drawn from these authorities is that enemy property captured on land does not, in the absence of any statute to that effect, require to be brought before a court for adjudication, and hence it is only fair to infer that when Mr. Justice Gray used the

words "captured by naval forces" he was thinking of such captures as "usually" are made, i. e., at sea.

Besides the provisions of Title LIV (the "Prize" title, sections 4613–4652), which obviously relates to maritime prize exclusively, the Revised Statutes also provide that property used, or permitted or intended to be used, in aid of any insurrection against the Government of the United States, or in aid of persons engaged in such insurrection, "shall be lawful subject of prize and capture wherever found," and that "such prizes and capture shall be condemned" in the proper court. (Sections 5308–5311.) Such property might of course be captured under such circumstances as to make it maritime prize, and presumably it was originally with reference to captures under such circumstances that the word "prize" was used; but it is expressly provided that even when taken on the inland waters of the United States the property shall *not* "be regarded as maritime prize," and *a fortiori* it could not be so regarded when taken on land.

As far as they go, therefore, sections 5308–5311 make against the contention that property captured on shore is maritime prize; but counsel for captors cite them (Brief p. 66) in support of that contention. They argue that because property taken on land under the insurrection laws must be condemned, therefore property taken on land in a foreign war must also be condemned; and further, that it must be condemned in a court of admiralty, and as prize, from which they conclude that the condemnation must be for the benefit of the captors. This argument involves at least three

instances of *non sequitur*. It does not follow at all that a practice expressly required by statute to be observed, in regard to property taken by naval, military, or civil force, at a time of insurrection, when the utmost care should be taken not to confound the innocent with the guilty, must also have been required by a statute which is silent on the subject, in the case of property captured in enemy's territory in a foreign war, and then *only* when such property is captured by a naval force. Furthermore, it does not follow that, if such condemnation were necessary, it would have to be in a court of admiralty; and lastly, it does not follow that even such a condemnation must necessarily be a condemnation in prize. The argument needs but to be fully stated to make manifest its fatal weakness.

It is true that sections 563 (paragraph 9) and 629 (paragraph 6) refer to property taken under the insurrection laws as "property taken as prize;" but even this rather loose use of the word "prize" does not aid the captors' argument. The proceedings referred to in sections 563 and 629 are not proceedings in admiralty, and section 5310 expressly states, in regard to property taken on inland waters, that it shall not be regarded as *maritime* prize. Moreover, as these proceedings under the insurrection laws are exclusively for the benefit of the United States, or the United States and the informer, and not for the benefit of the captors individually, the analogy fails at still another point.

The counsel for captors (Brief p. 66) also point to the act of March 3, 1899, chapter 413, section 13, abolishing prize money and bounty, as proof that there

must be a condemnation as prize even where the proceeds would go to the Government. It is true that under this act of 1899 the Government would seem to have succeeded to the former rights of the captors, and that in those cases in which formerly there was a condemnation for the benefit of the captors, or the Government and the captors, there would be a condemnation for the benefit of the Government alone. This, however, can not possibly affect cases in which previously no condemnation as prize was required, nor can it be tortured into a declaration that such condemnation had previouly been required in all cases of capture. It left the law just as it was before, except that it abolished the personal rights of captors.

In the brief of the counsel for the captors (p. 32) section 2 of the act of July 17, 1862, and the *first sentence* of section 10 of the act of June 30, 1864, are printed in parallel columns, as if to intimate that the purpose of section 10 of the act of 1864 was solely to substitute the words, "net proceeds of all property condemned as prize," for the words, "proceeds of all ships and vessels, and the goods taken on board of them, which shall be adjudged good prize," in the act of 1862. This use of a single sentence of section 10 of the act of 1864 is likely to be misleading, because the purpose of that section can not properly be understood unless the whole of it is compared with the corresponding provisions in the act of 1862.

The act of 1862 was "An act for the better government of the Navy of the United States," and the provisions in regard to prize were only incidental to its

main object. Other provisions were enacted in other statutes. The act of 1864, on the other hand, was "An act to regulate prize proceedings, and the distribution of prize money, and for other purposes." It was a codification of the prize law, previously found in several statutes. Section 10 takes the place of sections 2, 3, and 6, and of the act of 1862, and its purpose is best seen by comparing it with *all* of those sections.

ACT OF JULY 17, 1862.

SEC. 2. *And be it further enacted*, That the proceeds of all ships and vessels, and the goods taken on board of them, which shall be adjudged good prize, shall, when of equal or superior force to the vessel or vessels making the capture, be the sole property of the captors; and when of inferior force, shall be divided equally between the United States and the officers and men making the capture.

[The corresponding provision in the act of 1862 is found in the fourth subdivision of section 3 and in section 6.]

SEC. 3. *And be it further enacted*, That the prize money belonging to the officers and men shall be distributed in the following manner:

First. To the commanding officer of a fleet or squadron, one-twentieth

ACT OF JUNE 30, 1864.

SEC. 10. *And be it further enacted*, That the net proceeds of all property condemned as prize shall, when the prize was of superior or equal force to the vessel or vessels making the capture, be decreed to the captors; and when of inferior force, one-half shall be decreed to the United States and the other half to the captors: *Provided*, That, in the case of privateers and letters of marque, the whole shall be decreed to the captors, unless it shall be otherwise provided in the commissions issued to such vessels. All vessels of the navy within signal distance of the vessel or vessels making the capture, under such circumstances and in such condition as to be able to render effective aid if required, shall share in the prize, and in case of vessels not of the navy, none shall be entitled to share except the vessel or vessels making the capture, in which term shall be included vessels present at the capture and rendering actual assistance in the capture. All prize money adjudged to the captors shall be distributed in the following proportions, namely:

First. To the commanding officer of a fleet or squadron, one-twentieth

part of all prize money awarded to a vessel or vessels under his immediate command.

Second. To the commander of a single ship, one-tenth part of all prize money awarded to the ship under his command, if such ship, at the time of making the capture, was under the immediate command of the commanding officer of a fleet or squadron, and three-twentieths if his ship was acting independently of such superior officer.

Third. The share of the commanding officer of the fleet or squadron, if any, and the share of the commander of the ship being deducted, the residue shall be distributed and apportioned among all the others doing duty on board, and borne upon the books, according to their respective rates of pay in the service.

Fourth. When one or more vessels of the Navy shall be within signal distance of another making a prize, all shall share in the prize, and money awarded shall be apportioned among the officers and men of the several vessels, according to the rates of pay of all on board who are borne upon the books, after deducting one-twentieth to the flag-officer, if there be any such entitled to share.

Fifth. No commander of a fleet or squadron shall be entitled to receive any share of prizes taken by vessels not under his immediate command; nor of such prizes as may have been taken by ships or vessels intended to be placed under his command, before they have acted under his immediate orders; nor shall a commander of a fleet or squadron, leaving the station where he had command, have any share in the prizes taken by ships left on such station

part of all the prize money awarded to any vessel or vessels under his immediate command.

Second. To the commanding officer of a division of a fleet or squadron, on duty under the orders of the commander in chief of such fleet or squadron, a sum equal to one-fiftieth part of any prize money awarded to a vessel of such division for a capture made while under his command, the said fiftieth part to be deducted from the moiety due to the United States, if there be such moiety, otherwise from the amount awarded to the captors: *Provided*, That such fiftieth part shall not be in addition to any share which may be due to the commander of the division, and which he may elect to receive, as commander of a single ship making or assisting in the capture.

Third. To the fleet captain, one-hundredth part of all prize money awarded to any vessel or vessels of the fleet or squadron in which he is serving, except in a case where the capture is made by the vessel on board of which he is serving at the time of such capture; and in such case he shall share, in proportion to his pay, with the other officers and men on board such vessel, as is hereinafter provided.

Fourth. To the commander of a single ship, one-tenth part of all the prize money awarded to the ship under his command, if such ship at the time of the capture was under the command of a commanding officer of a fleet or squadron, or a division, and three-twentieths if his ship was acting independently of such superior officer.

Fifth. After the foregoing deductions, the residue shall be distributed and proportioned among all

after he has gone out of the limits of his said command, nor after he has transferred his command to a successor.

Sixth. No officer or other person who shall have been temporarily absent on duty from the vessel, on the books of which he continued to be borne while so absent, shall be deprived, in consequence of such absence, of any prize money to which he would otherwise be entitled.

SEC. 6. *And be it further enacted*, That any armed vessel in the service of the United States which shall make a capture, or assist in a capture, under circumstances which would entitle a vessel of the Navy to prize money, shall be entitled to an award of prize money in the same manner as if such vessel belonged to the Navy; and such prize money shall be distributed and apportioned in the same manner and under the same rules and regulations as provided for persons in the naval service, and paid under the direction of the Secretary of the Navy.

others doing duty on board (including the fleet captain) and borne upon the books of the ship, in proportion to their respective rates of pay in the service.

No commanding officer of a fleet or squadron shall be entitled to receive any share of prizes captured by any vessel or vessels not under his command, nor of such prizes as may have been captured by any ships or vessels intended to be placed under his command, before they have acted under his orders. Nor shall the commanding officer of a fleet or squadron, leaving the station where he had command, have any share in the prizes taken by ships left on such station after he has gone out of the limits of his said command, nor after he has transferred his command to his successor. No officer or other person who shall have been temporarily absent on duty from a vessel on the books of which he continued to be borne, while so absent, shall be deprived, in consequence of such absence, of any prize money to which he would otherwise be entitled. And he shall continue to share in the captures of the vessels to which he is attached until regularly discharged therefrom.

Passing by, for a moment, the first sentence of section 10 of the act of 1864, it is seen that the section restricts slightly the rights of vessels within signal distance, especially vessels not belonging to the Navy, and also that it gives the commander of a division of a fleet or squadron, and the fleet captain, special shares in the distribution. The actual changes in the provisions of the law are not very important, but there are also a number of verbal changes, here and there,

which do not seem to alter the provisions at all. Evidently those who drafted the act of 1864, and threw sections 2, 3, and 6 of the act of 1862 into a single section, thought that they could improve on the language of their predecessors, even where they retained the substance of the earlier statute. In the first sentence of section 10 this same desire to improve the language of the law is evident, and the awkward wording of section 2 of the act of 1862 (where the words "when of equal or superior force," should, by the ordinary rules of construction, refer to "proceeds," although, of course, they were meant to refer to "ships and vessels") justified the attempt. In making this change of wording the seventeen words, "ships and vessels and the goods taken on board of them, which shall be adjudged good prize," were replaced by the four words, "property condemned as prize," evidently to avoid prolixity, and for no other purpose. The change was justified by authority, for even in England Lord Stowell had said "I know of no other definition of prize goods than that they are goods taken on the high seas, *jure belli*, out of the hands of the enemy." It was simply the substitution of a shorter phrase for a longer one, the two having had the same meaning ever since the beginning of the Revolution. Up to the time when the words "property condemned as prize" were used in the act of 1864, no property could lawfully have been condemned as prize except "ships and vessels, and the goods taken on board of them;" so that the

word "prize" was, in the United States, inseparably connected in men's minds with the idea of a capture on the water; and Congress would have been astounded if it had been told in 1864 that it had abandoned the established American rule, and the generally accepted law of nations, substituting in its place a practice authorized only by special commissions and temporary statutes in England, and manifestly not contemplated by the other provisions of the act of 1864.

In regard to American authorities prior to the passage of the act of 1864, the position of the counsel for captors is peculiar. They not merely overlook the fact that the decision in *Mrs. Alexander's Cotton* (2 Wall., 404) was in regard to a section which had been on the statute books, in the identical words, from April 23, 1800, so that the decision must be taken as a statement of the law as it had existed from that date; but they also seem to think that prior decisions in the district court, in direct conflict with *Mrs. Alexander's Cotton*, and clearly overruled by that case, may still be cited as authority!

In regard to *Brown* v. *United States* (8 Cr., 110), they say (p. 62):

> But Chief Justice Marshall does not question the principle laid down by Justice Story, that the admiralty takes jurisdiction of captures made on land by a naval force.

A similar statement is made on page 41.

Bearing in mind the fact that section 5 of the act of April 23, 1800, which was in force when *Brown* v

United States was decided, was identical with the section construed in *Mrs. Alexander's Cotton*, which held that property captured on land by a naval force was "not maritime prize, and should have been turned over to the agents of the Treasury Department," instead of to the control of a court of admiralty, it is clear that even if Chief Justice Marshall did not think it necessary to pronounce as to whether the admiralty took jurisdiction of captures made on land by a naval force, he can not be *presumed* to have been of an opinion which this court has held to be erroneous. The late Mr. Justice Miller, however, who was on the bench when *Mrs. Alexander's Cotton* was decided, took an entirely different view of what Chief Justice Marshall meant to decide in *Brown* v. *United States*, for he said:

> The great judge, and the court for whom he spoke, proceeds upon the doctrine of the definition of Sir William Scott, quoted above. ["I know of no other definition of prize goods than that they are goods taken on the high seas, *jure belli*, out of the hands of the enemy."] The property in question [in *Brown* v. *United States*] was not captured on the high seas, and, although it had been but imperfectly landed, yet *as it had been placed beyond the action of the water*, it was removed from the prize jurisdiction. Mr. Justice Story, in his dissent, insists that the jurisdiction extends to captures on land by a naval force. And it is in this, as well as in several other positions of his very learned opinion, that he is overruled by the court. (*United States* v. *269½ Bales of Cotton*, 1 Woolw., 236; 28 Fed. Cas., 302, 309.)

In view of the fact that Mr. Justice Miller's opinion was rendered in October, 1868, more than four years after the act of 1864 was passed, it is manifest that with his decided views as to the total overruling of Story in *Brown* v. *United States*, he would have stated that the act of 1864 had established Story's view if he had believed that such was the case.

Of course Mr. Justice Miller's statement is merely *obiter*, and counsel for captors can not be debarred from contending, as they obviously wish the court to infer, that if Chief Justice Marshall had been alive in 1864 he would have dissented from the decision in *Mrs. Alexander's Cotton;* but it is at least interesting to note that one of the judges who decided that case believed that its doctrine was the same that Marshall had held.

The same broad view of what was meant by *Brown* v. *United States* seems to have been held by the late Mr. Justice Gray, when he referred to it as a "decision that enemy property on land, which by the modern usage of nations is not subject to capture as prize of war, can not be condemned by a prize court, even by direction of the Executive, without express authority from Congress." (*The Paquete Habana*, 175 U. S., 677, 711.) His habitual clearness of statement makes it certain that if he had meant "except when taken by a naval force," he would have said so.

In the brief for the United States (p. 126) it was stated that the decision in *Mrs. Alexander's Cotton* had overruled the earlier district court case of *1,253 Bags of Rice* (Blatch. Pr. Cas., 211; 18 Fed. Cas., 723). To

speak with absolute precision, the title of the overruled case was *103 Casks of Rice*. The two cases were decided at the same time, and the district judge disposed of them both in the same opinion. As a matter of fact, his decision was correct in *1,253 Bags of Rice*, that property having been taken "afloat, in an enemy port," but in *103 Casks of Rice* the decision was clearly wrong, as the casks were taken on shore. This decision was manifestly overruled by *Mrs. Alexander's Cotton*.

In spite of the fact that *Mrs. Alexander's Cotton* was not merely a later decision, but one of a higher tribunal, the brief for the captors (p. 62) actually calls attention to *103 Casks of Rice* as "a case that squarely maintains our [i. e., the captors'] proposition, and which has never been overruled." This extraordinary statement can hardly be a mere printer's error, but the fact that it is erroneous does not need the support of any argument, certainly not in this court.

This overruled decision is again cited as authority (this time under the title of *1,253 Bags of Rice*), together with the two other overruled cases, on pages 41–43 of the brief of counsel for captors.

On page 64 the counsel for captors cite the following as an authority:

> The jurisdiction of these courts [i. e., the courts of admiralty] extends as well to goods taken on land by a naval force, or in consequence of the operations of a naval force, as to property captured on the water. (Wheaton on Captures, 278.)

Wheaton's treatise was published in 1815, and the statement just quoted is wholly based upon Lord Mansfield's statement in *Linds* v. *Rodney* (2 Doug., 613), and other English authorities, all of them supported merely by the special commissions and temporary statutes of Great Britain. It was not the law of the United States at that time, for the section which was judicially construed by this court in *Mrs. Alexander's Cotton* had been in force, word for word, since 1800, and that case decided not merely that property captured on land was not prize for the benefit of captors, but that it was not with the jurisdiction of a court of admiralty. Whether Mr. Wheaton thought that his statement was, or ought to be, true of the United States is immaterial. Very possibly he did, as he was much influenced by Judge Story's views; but as the decision in *Mrs. Alexander's Cotton* was diametrically opposed to those views on this point, they can have no weight as authority.

In support of the indisputable proposition that the English law of prize, "so far as it is adapted to the altered circumstances and conditions of the country, and has not been modified by the proper national authorities," has continued to be our law, counsel for captors (Brief, p. 40) cite, among other cases, *30 Hogsheads of Sugar* v. *Boyle* (9 Cr., 191, 198). What was said by Chief Justice Marshall in that case is worth quoting. He said:

> It will not be advanced, in consequence of this former relation between the two countries, that any obvious misconstruction of public law

made by the British courts will be considered as forming a rule for the American courts, or that any recent rule of the British courts is entitled to more respect than the recent rules of other countries. But a case professing to be decided on ancient principles will not be entirely disregarded, unless it be very unreasonable, or be founded on a construction rejected by other nations.

The British rule which treated booty captured by a naval force as prize (in so far as the operation of special commissions and temporary statutes can be a rule at all) was, it is submitted, at variance with public law as adopted by other nations, and therefore, by the above doctrine, it would not properly have been followed by our courts even if a statute had not prevented it.

In seeking to introduce this British rule, however, counsel for captors fail to consider the effect of the previous action of Congress. Granting that if Congress had never acted in regard to booty captured by a naval force, and had never passed laws which prevented such captures from being treated as prize, the English rule might have prevailed. The fact remains that Congress did pass such laws from the very first. If Congress, in 1864, had simply repealed every statute and portion of a statute in regard to prize, could it have been contended that such repeal would have made effective in the United States the English prize laws which had been in force before the Revolution, laws which had themselves expired years ago, and which had

been succeeded by others on the breaking out of other wars, with which we had had nothing to do, except possibly as enemies? Such a contention would be the height of absurdity. A simple repeal of all prize statutes would have put an end to prize, and nothing would have taken their place. If, therefore, the British prize law could not be impliedly reestablished in this country by a mere repeal of our own laws, neither could any part of it be impliedly reestablished by a mere change in the wording of our laws. Whatever was the intention of Congress in 1864, one thing is certain, the old British rule (if it was a rule), which our statutes had excluded from the first, could not possibly have been reestablished by implication.

In connection with the attempt to hold the small nonseagoing craft as maritime prize, counsel for captors (Brief, p. 74) point to section 3 of the Revised Statutes defining the word "vessel" as every description of water craft capable of being used as a means of transportation. It can not be denied that the Filipino cascos, and even the wrecking boats, were vessels, but it does not follow that they were such vessels as to be within the prize act. The only vessels with which the statutes under the title "Prize" have to deal are obviously ships or other craft such as are capable of going to sea and are ordinarily provided with documents.

The fact that these small craft were not covered by the libel as originally filed is attempted to be explained by the fact that it was filed before Admiral Dewey

had reached this country (brief, p. 76); but this explanation does not account for the fact that when the board of appraisal, in June, 1898, undertook to appraise every piece of Spanish property appropriated up to that time, which they claimed as prize, they did not include these boats, though they did include all the boats at the arsenal or belonging to the wrecks. Neither does it account for the fact that no appraisal of these Filipino craft as prize property was ever made. The only explanation is that the Admiral and his officers never thought of regarding them as prize.

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IN THE

Supreme Court of the United States.

The Manila Bay Prize Cases.

THE UNITED STATES, *Appellant*,
v.
GEORGE DEWEY, Admiral, U. S. N. } No. 309.

GEORGE DEWEY, Admiral, U. S. N., *Appellant*,
v.
THE DON JUAN DE AUSTRIA *et al.* } No. 310.

EDWIN F. STOVELL, *Appellant*,
v.
GEORGE DEWEY, Admiral, U. S. N. } No. 311.

BRIEF OF COUNSEL FOR CAPTORS.

The Appeals.

These are appeals from the decree of the Supreme Court of the District of Columbia upon the libel of Admiral Dewey, claiming condemnation of property captured at the battle of Manila Bay, May 1, 1898. The decree condemned a portion and released a portion of the property. Both parties have appealed.

The court below, by the same decree, denied the right of certain intervenors to share in the prize. A third appeal is prosecuted in their behalf. Except as to these parties, the decree below did not consider questions of distribution, following in this respect the usual procedure in prize causes.

The Procedure.

Proceedings in prize causes are governed by Revised Statutes, Chapter LIV, §§ 4613–4652. The material sections of this chapter are inserted in this brief hereafter.

In ordinary cases, the prize property is delivered by the captors to the custody of the prize court and proceedings for condemnation are undertaken by the United States. The issues rest on the proceedings for condemnation and are usually between the United States, appearing both on its own behalf and on behalf of the captors, and adverse parties resisting condemnation.

In the present case, the property captured was all appropriated by the United States, as permitted by law. (R. S. §§ 4624 and 4625.) Application was made by the captors to the Secretary of the Navy to proceed in condemnation of this property as prize, but the government failed to do this, and thereupon, under the authority granted by § 4625, the libellant, as commander-in-chief of the capturing force, himself instituted a libel, praying the condemnation of the property which had been taken by the United States. The United States, by whom the prize money will ultimately be payable to the captors as a result of the decree of condemnation, out of the property appropriated for public use, appears as party defendant, resisting the condemnation. The answer of the United States is a general denial that the property claimed, with a certain exception, which will hereafter appear, is properly subject to condemnation as prize.

The chief precedent in this form of action is the case of *David G. Farragut, Admiral, U. S. N.* v. *The Ship Metropolis*, brought, like this case, in the Supreme Court of the District of Columbia and reported in this court as *United States* v. *Farragut*, 22 Wall. 406. So far as possible, the procedure in that case has been followed in this.

Statement of Case.

When Admiral Dewey and the American fleet under his command won the battle of Manila Bay, May 1, 1898, a considerable quantity of enemy property was captured, and the object of this libel is to secure its condemnation as prize. The property consisted of the following classes, separately forming the subject of consideration:

(1) Property captured afloat, including various vessels, their equipments and cargoes.

(2) Three of the enemy's vessels of war which, as a result of the battle, were sunk in shallow water and remained partly immersed until raised by the United States and refitted. These are now in the United States Navy.

(3) Property taken from vessels which were sunk or otherwise destroyed.

(4) Property captured on shore, consisting of naval supplies in the naval station at Cavite.

(5) Certain cargo boats and wrecking boats, the private property of Spanish subjects, taken by the Navy and used in the operations of war.

The court below condemned the first three classes, but released the last two. Both parties have appealed.

Assignment of Error.

For error, the libellant avers that the court erred in the following particulars:

(1) In holding that the property captured by the fleet under libellant's command, situated ashore at the naval station at Cavite, is not lawful prize of war, subject to condemnation and distribution to the captors.

(2) In holding that the cargo boats and wrecking boats captured from subjects of Spain are not lawful prize of war, subject to condemnation and distribution to the captors.

ARGUMENT.

The Facts.

The consideration of the case will be greatly aided by an exact statement of the facts contended for on behalf of the captors. The facts believed to be established by the evidence are as follows:

[The references by pages to the record in this case are designated Rec.; those to the Appendix to the Report of the Bureau of Navigation for 1898, Vol. II of the Report of the Secretary of the Navy, are designated App.]

1. On May 1, 1898, a state of war existed between the United States and the King of Spain, and the libellant was in command of the United States naval force on the Asiatic Station (Rec. ix; App. 65).

2. An engagement took place on that date between the naval force of the United States, under command of the libellant, and a Spanish fleet consisting of the *Reina Cristina*, *Castilla*, *Don Antonio de Ulloa*, *General Lezo*, *Marques del Duero*, *Argos*, *Velasco*, *Isla de Mindanao*, *Don Juan de Austria*, *Isla de Cuba*, *Isla de Luzon* and *Manila*, supported by shore batteries, submarine mines and torpedoes, resulting in the defeat of the Spanish forces (Rec. ix; App. 69; Findings of the Court of Claims).

3. The *Don Juan de Austria*, *Isla de Cuba* and *Isla de Luzon*, under the severe gun fire of the American fleet, steamed to a position of greater safety, and still entirely perfect, so far as flotation was concerned, after the battle, dropped anchor, backed ashore, and when in shallow water opened the sea-valves and settled on the bottom (App. 81, 92; Rec. 59). The upper works were afterward, under orders of Admiral Dewey, set on fire by a detachment from the United States fleet (App. 71, 81, 83).

4. The condition of the three vessels named after the battle was as follows:

Don Juan de Austria.—The forward end of the main deck was about three feet above water and the after end about three feet below water at low tide (Rec. 134, 58). The soundings showed from fourteen to fifteen feet of water (Rec. 136).

Isla de Cuba.—The forward end of the main deck was about three feet out of water and the after end two feet below water at low tide (Rec. 134, 135, 58). The soundings were eight to ten feet at low tide (Rec. 135).

Isla de Luzon.—The forward end of the main deck was about one foot below water, and the after end about four feet above water at low tide (Rec. 134, 58). The soundings showed twelve to fifteen feet of water (Rec. 136).

The principal damage on all three vessels was done by fire, which, in consuming the wood-work, caused heavy warping and buckling on the adjacent metal-work. On all three vessels the fire was limited principally to the part from bridge-house to stern, extending from poop to berth deck. On the *Don Juan de Austria* some damage was done by shot, though not of sufficient consequence to be specified; on the *Isla de Cuba* and the *Isla de Luzon* the damage from this cause was unimportant.

The following specified conditions pertain to the *Isla de Luzon*, but may be taken generally as applicable also to the *Isla de Cuba*:

Hull-work.—Skin plating and framing was scorched, warped, and buckled from near the water line upwards, along stern and along both sides to about abreast the boiler hatch. Most of the plating and some of the framing in the region of the poop was in such condition that when the vessel was refitted it had to be removed and straightened, and some of it renewed from the berth deck upward, and part of the plating of the hammock berthing had to be removed and straightened as far as the break of the forecastle.

For decking, the wood flat was burned away on poop and on main deck from the stern to the break of the forecastle. The heat caused severe warping of the plates, hatch combings, deck stringers, and deck beams, causing the beams to collapse in many cases, particularly on the poop. It was noticeable that the metal flat beneath the wood flat caused complete protection for the beams beneath it in the part where it extended over the upper coal bunkers.

The forecastle deck was unburned.

For bulkheading, the structural bulkheads were more or less intact, requiring partial renewal in the case of a few individual plates. The upper coal-bunker bulkheads were warped, and in some cases badly corroded, requiring to be taken off, straightened, and to be partially renewed. All stateroom bulkheading was completely consumed and store-room bulkheading and battening below the berth deck, as in general with wood-work, were rendered useless. The water-tight doors of bulkheads were in fair condition, requiring cleaning.

Machinery.—The main engines were in good condition, and the main boilers were in only fair condition, due principally to use and neglect in service.

The auxiliary machinery was in fair condition. All engines and machinery suffered such damage by submersion as to require complete overhauling and some renewal before going into service.

The condition of the *Don Juan de Austria* was similar to that of the *Isla de Cuba* and *Isla de Luzon*, with the following principal differences:

The effect of fire was more pronounced, main-deck and poop-deck beams having sunk in more extensively.

The boilers required extensive repairs. The effect of corrosion in general was less pronounced than in the other two vessels, due in part, no doubt, to the fact that this vessel is of iron and has much heavier scantlings.

(The foregoing is taken from the report of Constructor Hobson, Rec. 137–139. Constructor Capps in his testimony, Rec. 56, 57, makes a similar statement but not in so great detail. Chief-Engineer Hall makes a similar general statement, Rec. 10.)

5. At as early a date as possible an examination was made of the *Don Juan de Austria*, *Isla de Cuba* and *Isla de Luzon*, and it was determined that it would be profitable to raise and restore them (Rec. 56, 57, 135). A contract was made by the United States, through Naval Constructor Washington L. Capps, who had been sent to Manila by the Secretary of the Navy (Rec. 56), and the Hong Kong & Whampoa Dock Company for raising and repairing and fitting out the three vessels named (Rec. 57, 135). This contract was signed on behalf of the United States by the commander-in-chief, and a copy forwarded to the Navy Department (Rec. 57, 135). The wrecking outfit was not such as could be gotten here, but consisted only of pumps, and the ordinary materials to be had in any first-class ship-chandler's establishment, and men (Rec. 59).

6. On October 29, work began on the *Isla de Cuba* (Rec. 135), and on November 7 she was gotten completely off (Rec. 136). On November 1, work began on the *Isla de Luzon* (Rec. 136), and on the 15th she was floated (Rec. 136). On the 1st of November work began on the *Don Juan de Austria* (Rec. 136), and she was floated on the 23d (Rec. 136). All three vessels were hauled upon the slip at the Cavite Naval Station (Rec. 136), and preliminary work done upon them (Rec. 136). In December, 1898, and January, 1899, they went to Hong Kong under their own steam (Rec. 57, 58, 136, 137).

7. They were completely restored and refitted and upon the conclusion of the work upon them were taken into the United States Navy, and are now upon the United

States Naval Register officered and manned by the officers and men of the United States Navy (Rec. 129–131, 132, 141; U. S. Naval Register, 1901).

8. The work done on the vessels was done under the control and direction of the Secretary of the Navy (Rec. 56, 60), and the vessels, while still in the water, were taken for and appropriated to the use of the United States (conclusion of fact from foregoing facts).

9. Other vessels and their fittings and supplies, including coal, were captured at the time while still afloat, and were taken for and appropriated to the use of the United States (Rec. 7, 8, 20). The vessels so taken included the *Manila* (App. 72, 81, Rec. 20), *Callao*, *Leyte*, *Mindanao*, *Rapido* (App. 81, 83), *Hercules* (App. 81, 83) and others (Rec. 122, 123, 7, 21, 82, 83).

10. All the vessels named in paragraph 2 above, excepting the *Don Juan de Austria*, *Isla de Cuba*, *Isla de Luzon* and *Manila*, were destroyed as the result of this engagement, by gun-fire, by internal explosions, by being run ashore or by sinking (App. 71, 72, 97; Rec. 134, 135; Findings of Court of Claims, Rec. 167).

11. As a result of the Battle of Manila Bay, the libellant and the force under his command captured the Spanish Naval Station of Cavite on Manila Bay (App. 71, Rec. 2). This station was used for building, repairing, supplying and refitting naval vessels and contained a large quantity of naval stores, also captured, intended for these purposes (Rec. 2, 3, 13, 30, 32, 33, 37, 44–48, 64–68, 76, 86, 100–106). It had been under the control of the Spanish naval authorities (App. 93; Rec. 2).

12. A portion of these stores was immediately taken on board the vessels comprising the libellant's fleet, and used for naval purposes on board said vessels—these including ordnance materials, fuel, electric apparatus, miscellaneous instruments, machinery and machine tools

paints and oils, and many other articles (Rec. 3, 4–8, 10).

13. By command of the libellant officers of his fleet were detached to take charge of the Naval Station and works of equipment and repair were begun and continuously carried on at said station, both on shore and on the vessels of the fleet, using the materials on hand (Rec. 9, 19, 29, 31, 39, 41, 64, 70, 71, 97). During the early part of these proceedings, and until about the middle of July, 1898 (Rec. 30, 42, 95), no other than the Spanish stores were available for such work (Rec. 30, 42, 95). Stores were sent out from the United States or purchased in Hong Kong from time to time, as needed for naval purposes at this yard (Rec. 30, 35, 95, 98), but the use of the Spanish stores continued until January, 1901, without interruption (Rec. 19, 30, 42, 54, 72–74).

14. A board of officers was appointed by the libellant on the 4th of June, 1898, to survey, appraise and inventory the enemy's property captured and appropriated for the use of the United States under § 4624 of the Revised Statutes (Rec. 113). This board made an appraisal, including in it the following classes of property, and no others (Rec. 77): (1) The vessels, their fittings and cargoes, captured afloat (Rec. 7, 8, 76, 122, 123); (2) such stores and supplies found ashore in the Naval Station as had been, during the month of May, removed on board the vessels of the fleet (Rec. 3, 4, 5, 8, 11, 70, 76, 78). The total appraised value of these classes of property, as found by the board, was $326,141.89 (Rec. 125).

The property captured ashore, not included in the appraisement aforesaid, was appropriated to the use of the United States as aforesaid (Rec. 8, 9, 11, 12, 31, 54, 97). It was never appraised or inventoried (Rec. 4, 8, 31, 41, 64, 96).

15. Besides the vessels and stores referred to in the foregoing paragraphs there were captured twelve cascos

or cargo boats, and two wrecking boats. These were also appropriated to the use of the United States, but were not appraised.

(Chief Engineer Hall says, Rec. 23, 8 or 10 at first and 20 altogether; Lieutenant Hodges, Rec. 69, says 5 at the time of the battle and 7 more before the arrival of the troops and 15 more later. The 12 were not paid for; the 15 were appraised and paid for. He describes the wrecking boats. Eleven of the 12 cascos, Rec. 74, were wrecked in use. Lieutenant-Commander Calkins captured 5 cascos, Rec. 76. They were used for carrying freight and troops, Rec. 79.)

16. Actions were instituted for bounty under § 4635 of the Revised Statutes on account of all the vessels named in the second paragraph hereof other than the *Don Juan de Austria*, *Isla de Cuba*, *Isla de Luzon*, and *Manila*, and bounty has been granted under that section for the destruction of said vessels (see opinion of Court of Claims, *Dewey* v. *United States*, 35 C. Cls. 172; and of this court, 178 U. S. 210) and paid (H. R. Doc. 354, 56th Cong. 2d Sess.; 31 Stat. L. 1052).

17. The vessels taking part in this engagement on behalf of the United States were the *Olympia*, *Baltimore*, *Boston*, *Raleigh*, *Concord* and *Petrel* (App. 70). The *McCulloch* was in signal distance of the capture under such circumstances, and in such condition, as to be able to render effective aid if required (App. 86, 105). The *Nanshan* and *Zafiro* were in signal distance, but were supply vessels armed only with one-pounders, and were not present under such circumstances, and in such condition, as to be able to render effective aid, if required. (See discussion of this subject, forming the concluding portion of this brief.)

18. The American vessels engaged in the battle, and their armaments, were of superior force to the Spanish

vessels captured and destroyed. The American vessels engaged in the battle were of inferior force to the entire Spanish force engaged, including vessels, the shore defences and the torpedoes and submarine mines (Findings of Court of Claims, 35 C. Cls. 178).

19. The appropriation to the use of the United States of the *Don Juan de Austria*, *Isla de Cuba*, and *Isla de Luzon*, and of the other vessels captured afloat, and their cargoes and fittings, and of the naval stores captured ashore, prevented any part of it being sent in for adjudication to any District Court of the United States. The Secretary of the Navy did not within three months after the capture designate a district for the institution of proceedings (Libel, par. 7, p. iv; Ans. par. 7, p x).

20. A portion of the stores captured at the arsenal at Cavite were afterward returned to Spain, under the provisions of Article V of the Treaty of Peace, proclaimed April 11, 1899, 30 Stat. L. 1757.

The Statutes.

The statutes affecting this case are all found in Chapter LIV of the Revised Statutes, the provisions of which are nearly all reenactments of the act of June 30, 1864 13 Stat. L. 306. The following sections are chiefly material:

§ 4613. "The provisions of this Title shall apply to all captures made as prize by authority of the United States, or adopted and ratified by the President of the United States."

§ 4624. "Whenever any captured vessel, arms, munitions, or other material are taken for the use of the United States before it comes into the custody of the prize court, it shall be surveyed, appraised, and inventoried, by persons as competent and impartial as can be obtained, and the survey, appraisement and inventory shall be sent to the court in which proceedings are to be

had; and if taken afterward, sufficient notice shall first be given to enable the court to have the property appraised for the protection of the rights of the claimants and captors. In all cases of prize-property taken for or appropriated to the use of the Government, the Department for whose use it is taken or appropriated shall deposit the value thereof with the assistant treasurer of the United States nearest to the place of the session of the court, subject to the order of the court in the cause."

§ 4625. "If by reason of the condition of the captured property, or if because the whole has been appropriated to the use of the United States, no part of it has been or can be sent in for adjudication, or if the property has been entirely lost or destroyed, proceedings for adjudication may be commenced in any district the Secretary of the Navy may designate; and in any such case the proceeds of anything sold, or the value of anything taken or appropriated for the use of the United States, shall be deposited with the assistant treasurer in or nearest to that district, subject to the order of the court in the cause. If, when no property can be sent in for adjudication, the Secretary of the Navy shall not, within three months after any capture, designate a district for the insitution of proceedings, the captors may institute proceedings for adjudication in any district. And if in any case of capture no proceedings for adjudication are commenced within a reasonable time, any parties claiming the captured property may, in any district court as a court of prize, move for a monition to show cause why such proceedings shall not be commenced, or institute an original suit in such court for restitution, and the monition issued in either case shall be served on the attorney of the United States for the district, and on the Secretary of the Navy, as well as on such other persons as the court shall order to be notified."

§ 4630. "The net proceeds of all property condemned as prize, shall, when the prize was of superior or equal force to the vessel or vessels making the capture, be decreed to the captors; and when of inferior force, one-half shall be decreed to the United States and the other half to the captors, except that in case of privateers and letters

of marque, the whole shall be decreed to the captors, unless it shall be otherwise provided in the commissions issued to such vessels."

§ 4634. "Whenever a decree of condemnation is rendered, the court shall consider the claims of all vessels to participate in the proceeds, and for that purpose shall, at as early a stage of the cause as possible, order testimony to be taken tending to show what part should be awarded to the captors, and what vessels are entitled to share; and such testimony may be sworn to before any judge or commissioner of the courts of the United States, consul or commercial agent of the United States, or notary public, or any officer of the Navy highest in rank reasonably accessible to the deponent. The court shall make a decree of distribution, determining what vessels are entitled to share in the prize, and whether the prize was of superior, equal, or inferior force to the vessel or vessels making the capture. The decree shall recite the amount of the gross proceeds of the prize subject to the order of the court, and the amount deducted therefrom for costs and expenses, and the amount remaining for distribution, and whether the whole of such residue is to go to the captors, or one-half to the captors, and one-half to the United States."

§ 4635. "A bounty shall be paid by the United States for each person on board any ship or vessel of war belonging to an enemy at the commencement of an engagement, which is sunk or otherwise destroyed in such engagement by any ship or vessel belonging to the United States or which it may be necessary to destroy in consequence of injuries sustained in action, of one hundred dollars, if the enemy's vessel was of inferior force, and of two hundred dollars, if of equal or superior force, to be divided among the officers and crew in the same manner as prize-money; and when the actual number of men on board any such vessel can not be satisfactorily ascertained, it shall be estimated according to the complement allowed to vessels of its class in the navy of the United States; and there shall be paid as bounty to the captors of any vessel of war captured from an enemy, which they may be instructed to destroy, or which is immediately de-

stroyed for the public interest, but not in consequence of injuries received in action, fifty dollars for every person who shall be on board at the time of such capture."

The Issues.

The issues involved on these appeals are only of law. The claim is based, as may be seen from the statement of fact above made, upon five different classes of prize property:

(1) Public vessels and their equipment and the goods upon them, belonging to the King of Spain, captured afloat and taken into the United States service and appraised.

(2) Vessels grounded in the battle and afterward raised—the *Don Juan de Austria*, the *Isla de Cuba* and the *Isla de Luzon*.

(3) Property taken from sunken vessels.

(4) Naval stores captured ashore at the navy yard. These are subject to a division into stores actually consumed in the United States service and stores recently returned to Spain. Part of those consumed were appraised and part were used without appraisal.

(5) Cascos or cargo boats, the property of subjects of the King of Spain.

The United States concede that the first class of prize property, public vessels of war captured afloat, their outfits and supplies, are rightly the subject of prize, and that a decree must be entered in favor of the libellant for these. The questions now to be discussed are:

1. Are the *Don Juan de Austria*, the *Isla de Cuba* and the *Isla de Luzon* prize?

2. Is the property taken from sunken vessels prize?

3. Is the property captured ashore prize? If so, is the property restored to Spain to be excluded?

4. Are the cascos prize?

We will take up these points in their order.

I. ARE THE *DON JUAN DE AUSTRIA, ISLA DE CUBA* AND *ISLA DE LUZON* PRIZE?

The facts have been quite fully stated above and references given to the evidence. It appears that at the close of the engagement at Manila Bay these three vessels were entirely perfect, so far as flotation was concerned, and that the Spaniards themselves ran them into shallow water and opened all the sea connections, letting them settle there; that the vessels, left in this condition, were immersed above the ordinary water-line, though one end of each of the vessels was well above water at low tide; that as they rested it was apparent that they could be floated and when raised would be of value, and that there was a marked difference between their condition and that of the vessels that were destroyed (Rec. 60). Under these circumstances the vessels were taken by and appropriated to the use of the United States. After an examination of their condition by a naval officer sent from the United States for the purpose, and report of the same made to the Navy Department in Washington, it was decided that the vessels were worth raising, and the United States, with a wrecking outfit crude in comparison with what could have been secured here on the Atlantic Coast, consisting only of pumps and the ordinary materials that can be found in a first-class ship-chandler's establishment, and men, closed the valves, pumped the water out and floated the vessels, after which they were taken to Hong Kong under their own steam, there repaired, and are now vessels of war of the United States Navy.

Capture the First Essential.

"Prize is generally used as a technical term to express a legal capture," said the Federal Court of Appeals in

Miller v. *The Ship Resolution* (2 Dallas, 4). The first section of Title LIV of the Revised Statutes, § 4613, says: "The provisions of this title shall apply to all captures made as prize." § 4615 refers to the "vessel making the capture" and to the "captured property." So throughout the title in regard to prize, the word "capture" appears everywhere, in §§ 4616, 4617, 4624, 4625 and numerous other sections, as indicating the first essential of prize.

In order to sustain a libel in prize, it is first necessary to show a capture.

Were These Vessels Captured?

To a capture these things are necessary:

(*a*) A subject of capture—here the enemy's vessel.

(*b*) A capturing force—here the libellant's fleet.

(*c*) The taking of the subject of capture from the possession of the enemy into the possession of the captors—here accomplished by taking complete control of the vessels, the waters in which they were left and the adjacent lands.

That the control was complete is shown by the fact that the vessels were raised, floated and repaired, and are now in the United States Navy.

After the battle of Manila was over, these vessels were no longer in the possession of the Spaniards; they were in the possession of the fleet of the United States. They were taken from the Spaniards by the United States Navy; they were under the control of these captors. It is true that they were in such condition that some labor and skill was required to move them and make them fighting machines again, yet none the less the capture from the Spaniards and the possession of the United States were complete. Such capture, made under the laws of war, constitutes prize.

A Completed Appropriation.

After the capture, under ordinary conditions of prize law, another condition is requisite — delivery of the captured property into the possession of a prize court for adjudication. This condition did not exist in this case, but the statute provides an equivalent condition.

It has already been seen that by §§ 4624 and 4625 of the Revised Statutes, captured property may be taken for the use of the United States. The exact form of language in these sections varies where the fact is referred to. The language of § 4624 is, "taken for the use of the United States"; in § 4625, in one place, "appropriated to the use of the United States," and in another, "taken or appropriated for the use of the United States." This taking or appropriation is by the statute made in all respects the equivalent of the delivery of the *res* to the prize court. The money value of the prize, by R. S. § 4625, heretofore quoted, which should be deposited by the United States, stands in place of the prize. An action similar to a libel against the vessel itself may be instituted, under this section, to fix the rights of the captors.

In the court below, it was conceded that the appropriation by the United States was here completed. It is difficult to see how any other position could have been taken, and it will doubtless be conceded here. The facts are exactly stated on this point in this brief, and detailed references are given to the evidence showing this. The Navy Department took these vessels under its control, appointed its representatives to supervise the operations on them, made a contract for floating them and assumed entire charge of directing their repair and later movements. The United States, now having the possession of the prize property captured by the libellant's command, can not deny the appropriation.

Whether the prize property be delivered to a prize

court and sold, or be appropriated by the United States, the result of the naval operation is the receipt of a thing of value; in the one instance, it is sold at public sale; in the other, it is sold to a paramount purchaser upon a fair valuation. The bodily possession of the vessels upon appropriation by the United States makes the right of prize complete and condemnation in prize must follow.

Illustration of the Right.

The soundness of this position is well illustrated by supposing the existence of somewhat different conditions. Had these been private Spanish vessels, beached in an effort to escape from capture after violation of blockade, floated under orders of the Secretary of the Navy and taken to a prize court, it is at once clear that no question ever could have been raised as to the jurisdiction of the court. There would have been in the court a *res* for adjudication, arriving in court by reason of their Spanish character, their violation of international law, and their capture by the naval forces of the United States. Condemnation proceedings could have been instituted by the United States or, under the provisions of Revised Statutes, § 4625, by this libellant. A further provision of the same section would have granted the right, known also to the British prize law, to the owners of the vessels, claiming their neutrality or innocence otherwise, to move for a monition to show cause or to institute a suit for restitution. The presence of the vessels themselves would have been an all-sufficient answer to any contention that they had not been captured, and the ability to sell the vessels and turn the proceeds over to the disposition of the court would have prevented any question as to the existence of the valuable *res* which is at the basis of the right of prize.

None of the conditions supposed in that case differentiating it from this is of the slightest legal materiality. In

the case supposed, the vessels were of private ownership. A prize tribunal must have been open to settle the title of the vessels and to permit a dispute by the vessel owner as to the right of prize; yet there is no difference in American prize law between a public war vessel of the enemy and a private commercial vessel, in regard to jurisdiction of the prize court. Cases arose in the civil war of condemnation of the enemy's vessels of war, The *Atlanta*, 3 Wall. 425. It is not material to show that captures of enemy's public vessels may have occurred under earlier laws where there were no legal proceedings in the absence of controversy over the rights of capture or distribution. That does not affect the jurisdiction where it is invoked under the statutes quoted.

The absence of the vessel is equally immaterial, since the appropriation by the United States of any prize, public or private, is made by statute equivalent, as we have seen, to the delivery of the vessel itself.

Were the Vessels "Sunk or Otherwise Destroyed"?

The existence of a statute granting a reward where no capture results from a successful naval battle, but, instead, the destruction of the enemy's vessels, is urged as a reason for denying the right of prize in this case. It is conceded that the conditions in this case are such that either bounty or prize money is granted. The government's position is apparently that, since the grant of bounty is "a substitute for the prize itself" (The *Selma*, 21 Fed. Cas. 1046) or "in lieu of it" (Porter *v.* United States, 106 U. S. 611), where there is no prize, prize money is not due when bounty is granted and that bounty is here granted. We readily accept the necessarily correlative position that bounty is not due where prize money is granted and shall show that the bounty statute fails to

include such a case as this. When that is proved, our learned opponent's logic results in the admission of a grant of prize money to the libellant.

§ 4635, already quoted, gives a bounty for each person on board a vessel of the enemy "which is sunk or otherwise destroyed" in an engagement. It can not be contended by the United States that these vessels were destroyed, because the vessels were plainly salvable, their flotation was unimpaired and they were later raised and repaired. Neither were they sunk, except that they rested on the bottom in shallow water, only slightly below their normal water line.

But (even if it should be admitted for the sake of the argument that the vessels were sunk) the description of a vessel "sunk or otherwise destroyed" does not include a vessel sunk, not destroyed, but later saved. The form of expression classes sinking as one form of destruction; "otherwise destroyed" implies that the alternative "sunk" means in some wise destroyed. "Sunk or otherwise destroyed" is equivalent to "destroyed by sinking or otherwise."

Not only the terms of the statute demand this meaning, but its reason requires it. A successful issue of a naval battle is either the capture or destruction of the enemy's vessels; capture is where a vessel comes into the hands of the captors; destruction is where the victory is equally complete, but no vessel accrues to the captors. In this case the vessel came into the hands of the captors and thence to the United States; it was not destroyed.

If a vessel is captured, the reward is measured by its value in the form of prize-money; if destroyed, by an arbitrary statutory rule. The prize-money is the primary reward derived from the property captured; the bounty, under § 4635, is a reward for an equal degree of gallantry where the result was equally fatal to the enemy, but

where no vessel remains for condemnation. The two grants are exclusive of each other; between them they cover the entire results of the successful sea fight.

Bounty Not Granted Without Destruction.

The correctness of our contention appears by supposing that the American fleet had sailed away from Manila after the battle, a course seriously considered, and that the Spaniards, again in possession of these vessels, had floated and restored them, and used them in the Spanish navy again to fight American ships. Could bounty be claimed on them because "sunk or otherwise destroyed," when they were actually doing battle for the enemy? Such a claim could be justly resisted. Or if sunk again in later battles and again raised, could bounty be claimed for a second or even a third "destruction?"

Through the conduct of these captors in action, the United States acquired these vessels. It holds them now as captured property and can not consistently do that and at the same time maintain that the actual captors did not take, but destroyed, them.

The Government lays stress on the fact of there being official reports that refer to these vessels as destroyed along with the other vessels of the Spanish navy that were actually destroyed in the battle. The ingenuity of such arguments is at the sacrifice of sound reason. This court will deal with facts, not words. It will not shift to the Navy the judicial responsibility of giving a definition of this statute. Even if statutory definition were a naval and not a judicial duty, the determination on the part of the Navy that these vessels were not destroyed, as evidenced by its raising them intact and having them now in its service, would outweigh the earlier conclusion of officers who may have reported them as destroyed.

Many judicial precedents can not be expected in a case of

this sort, but one exact precedent is found in the Supreme Court of the District of Columbia in the case of the *United States* v. *The Ram Albemarle.* The facts in this case are facts of history. The *Albemarle* was blown up at her wharf and sunk. She was raised, appropriated by the United States, appraised and condemned in prize. The case was not contested; the decree entered by the court below was not appealed from. Subsequent litigation arose over the same subject and resulted in the report of the proceedings in the original condemnation in the case of *Swan* v. *United States,* 19 C. Cls. 51.

The Court Below.

The learned and lamented judge of the Supreme Court of the District of Columbia, in his opinion (Rec. pp. 157, 158) states the argument very strongly for our contention, and attention is asked to this.

It is submitted that the *Isla de Cuba, Isla de Luzon* and *Don Juan de Austria* were captured by the naval force commanded by Admiral Dewey and appropriated by the United States, and consequently that a decree should be entered for their condemnation in prize and for the distribution of one-half their value to the captors.

The Government's Argument.

The learned attorney for the Government has quoted decisions relating to the abandonment of vessels to insurers by the insured, laying stress upon cases which hold that the right to abandon is to be determined from the facts as they exist on the date of abandonment. The rules governing abandonment are laid down by the courts to define the equities of parties standing on their strict rights, and the effort of judges always is to do equity between the parties, giving always to every countervailing act and right of each its due influence.

Counsel totally ignores, however, the idea permeating all the law on this subject, that the parties themselves may determine their rights *inter sese*, by electing to do so; *e. g.*, an abandonment which would determine the status and title of the vessel may be revoked before it is accepted, and this revocation the jury may even infer *in invitum* from the acts of a party. *Columbian Insurance Co.* v. *Ashby*, 4 Peters, 139–7, 609. So also:

"A loss which was once total may by matter *ex post facto* become a partial one. Thus, if a ship be captured the loss is total and no doubt if she continue within the power of the enemy up to the time of bringing the action, the insured may recover for a total loss. But if she escape, or be recaptured, so as to be still of value, that which was once a total loss becomes a partial loss."

Smith's Mercantile Law, Third Edition, by Holcomb & Gholson, p. 480.

In a note in this same volume, on page 475, numerous cases are cited as to acceptance of abandonment, revocation or waiver. All these cases are based upon the fundamental idea that the changing of the status of the ship and the passing of the title from the insured to the insurer, by abandonment, is matter entirely within the control of the parties. If this analogy affords any light in the case at bar, the libellant and the defendants might have elected to treat the *Don Juan de Austria*, *Isla de Cuba* and *Isla de Luzon* as cases of total loss by sinking and destruction; and by such election they would have been bound. As a matter of fact, both parties have elected, the plaintiff by advising the raising of the ships and by bringing the suit, and the defendant by raising, repairing and taking the ships into possession and making an appraisement of their value as captured vessels, to treat them as such. If this court should hold with counsel, that the United States can, under the circumstances, pay

bounty for these vessels as destroyed ships, and at the same time retain and use them as captured vessels, it would thereby sanction an injustice for which no analogy can be found in the law of marine insurance and which would indeed be an anomaly in American jurisprudence.

The Government's brief argues strenuously that these vessels were "sunk or otherwise destroyed," although now in the navy, and not captured, because they were not actually floated for six months after they came into the captor's possession. The frank logic of the counsel's brief is forced to say that the vessels were sunk or otherwise destroyed on May 1, 1898, "and they remained so for six months thereafter." But how can a vessel be temporarily destroyed? Destruction once effected is permanent; the word involves finality. The Phœnix is known only to fable.

The defect in the argument is that the fact of status is confounded with the ascertainment of the fact. The vessels were actually captured, not destroyed, on May 1, 1898; their presence in the navy to-day proves that conclusively. The ascertainment that they remained effective vessels, not valueless wrecks, was delayed until due examination could be made. Neither this delay nor the early official designation of them as destroyed affected the fact. The Government holds them to-day by reason of their capture; the difficulties and expenses involved in repairing them makes a reduction in the money value of the property captured but does not change the fact.

It is unnecessary to follow the details of the laborious argument by which the opposing theory is built up. That theory is met by the plain fact of the existence of the vessels to-day. From this follows the grant by the statute to the captors of a share in their value on their appropriation by the United States.

Wherever learned counsel quotes the statute he is at

pains to add to it numerous qualifying words to make it fit his theory. This demonstrates the fallacy of his argument. The libellant rests on its plain terms and under these asks a decree.

II.—PROPERTY CAPTURED FROM SUNKEN VESSELS.

The second branch of this claim is for property taken from the sunken vessels in the Spanish fleet.

The Government asserts that guns and other severable articles attached to the vessel form a part of her equipment, and the reward granted by law to the captors is determined by the fate of the vessel itself, even if such articles are saved. Consequently, it is said that if bounty is awarded for the destruction of the vessel, the guns which are recovered must go to the United States without distribution of prize money to the captors.

All rights to the distribution of prize money and bounty rest upon the statute; every claim must be founded upon the statute and every defense must be determined by the test whether the statute either omits or prohibits the grant claimed. The statute itself is the only guide; that relieves this question of embarrassment.

Capture Creates Prize.

The first section of Title LIV, "Prize," R. S. § 4613, declares that the provisions of this title, which includes the section governing distribution of prize money, shall apply to "all captures made as prize by authority of the United States." All the remaining sections of this chapter, in referring to the captured property, recognize that this may be either a vessel or other property. Thus, in § 4615, the documents are to be secured both of the ship and cargo. In certain conditions, a survey shall be had "of

the captured vessel or any part of the captured property." By § 4622, duties are imposed upon the prize commissioners "as soon as any prize property comes within the district." They are to make "their own inventory of the prize property," and they are to report "if the captured vessel or any of its cargo or stores may be useful to the United States." By § 4623, the marshal is to keep safely "all prize property." § 4624 makes provision "whenever any captured vessel, arms, munitions or other material are taken for the use of the United States." By § 4630, "the net proceeds of all property condemned as prize" shall, under certain conditions, be decreed to the captors. Thus, throughout the chapter, a careful reading will show that it is not captured vessels alone which are to be condemned as prize, but it is captured property. Such property may be vessels; it may be of some other kind. Whatever may be so captured is subject to the same disposition, since the language of § 4613 creates a uniform rule for all prize property.

Property was saved from several vessels which were themselves destroyed. Such property was captured by the libellant's fleet and is in the possession of the United States because so captured. The Government, with the property in its possession, can not deny the capture, and this must result in condemnation, since the statute makes capture the test of the right of condemnation in prize.

No Implied Repeal.

The Government meets this plain and straightforward application of the words of the statute by the argument that the grant of bounty by R. S. § 4635 for the destruction of a vessel excludes a grant of prize money for the capture of any portions of the destroyed vessel's outfit which might have been saved. This argument, when reduced to its essentials, is that § 4635 impliedly repeals

the other provisions of the same chapter making prize of such property. Such a contention is easily seen to be unsound. Repeals by implication are not favored. A repeal of one portion of a statute by another portion of the same statute can not be implied; rather are the two parties to be reconciled. *Rodgers* v. *United States*, 185 U. S. 83. Here an easy reconciliation is effected. The bounty for the destruction of the vessel may be received by the captors, while the prize money should be decreed them for the capture of its armament. We rest our claim upon the sound principle of a plain reading of the statute itself.

The reasons impelling this enactment by Congress are all upon the surface of the statute. The primary reward for a successful naval combat is prize money derived from the property captured. This depends upon the existence of a *res* to be sold or appropriated by the Government, the value of which is to be distributed to the captors to such an extent as the law may provide. Where such a *res* exists, the jurisdiction of the prize court attaches and the right of the captors to a distribution follows. Bounty is granted, as we have seen, where the gallantry and success were both as great, but where the vessel itself, the chief subject of prize money, was destroyed.

Therefore, to determine whether any prize money is due, the first question is whether there is captured property; if so, prize money accrues. Here this condition exists.

Bounty is granted (R. S. § 4635) for the destruction of "a ship or vessel of war." This section says nothing about cargo, armament or equipment. This grant does not take away the right to share in prize money derived from the sale of such portions of the vessel's equipment as may be saved.

The possibility of question in the adjudication of this case comes alone from the fact that the United States

took possession of this property. Had this been delivered to a prize court and sold at auction, no shadow would ever have arisen over the right of the captors to one-half the proceeds of the sale. The appropriation by the United States takes the place of the judicial sale, and the value of the property furnishes the measure of the fund from which the captors are to be paid.

The Court Below.

The opinion of the court below was in favor of the condemnation of all property captured from sunken vessels. The language is as follows:

"The next question is whether libellant is entitled to condemnation in prize of the value of property taken from vessels sunk or otherwise destroyed.

"In behalf of the United States it is objected that, inasmuch as libellant has received bounty for the destruction of these vessels under § 4635, he is not entitled, as prize, to property taken from them; that bounty is 'a substitute for the prize itself'—(*The Selma*, 1 Low. 30)—something given 'in lieu of it' (*Porter* v. *United States*, 106 U. S. 607). Bounty is given in lieu of prize only in the case of a ship or vessel of war belonging to an enemy which is sunk or otherwise destroyed, or which it may be necessary to destroy in consequence of injuries received in action. It is proportioned not to the value of the ship, or of its armament or munitions, but to the number of persons on board of her at the commencement of the engagement. While it may be true that the original idea was that the amount so ascertained would be a fair substitute for the prize itself, and such idea may have been not far wrong in the days of wooden vessels of war, yet in these days of steel armored cruisers and battle ships, with all of their expensive appliances, the highest amount of bounty allowed is very inconsiderable compared with the value of the ship sunk or destroyed. It is not an equivalent for prize. There is, therefore, no reason arising out of the amount paid as bounty that would justify the claim that, in fairness, such reward should be exclusive.

"The reward is apparently bestowed for the injury done to the enemy in the loss of fighting power; it matters not how valuable may be the appliances and outfit that go down with her or that are involved in her destruction.

"If the vessel were captured, the cargo or outfit and appliances would enter into the estimate of the total value. I find nothing in the statute to prohibit the condemnation in prize of property captured or taken from ships sunk or destroyed in addition to bounty paid for the destruction of the ship, and I am of opinion that it should be allowed."

The Government's Objections.

The brief of counsel labors to show that there can be no severance of the vessel and its equipment. His learning is admirable, but the argument forgets the principle earlier laid down in his brief, that rights in prize are dependent upon the statutory grant and find both their origin and limitations there. We have pointed out that there is no exception in the grant excluding such property as this and that the whole theory of exclusion is based on the implied repeal of the prize money by the grant of bounty, a proposition which needs but to be stated to exhibit its repugnance to settled rules of statutory construction. The property captured is in existence and in possession of the United States because of its capture. The Government can not refuse to share its value with the captors.

III. PROPERTY CAPTURED ASHORE.

As the result of the battle of Manila Bay there was captured and afterward taken for use of the United States, before it came into the custody of the prize court, a large amount of arms, munitions of war and other naval material, on shore. That property was captured at the

Naval Arsenal at Cavite, an arsenal corresponding to one of our navy yards and the principal base of supplies for the Spanish navy in the Philippine Islands. This was public property; it belonged to the King of Spain. It was arms, munitions and other material for use in naval operations against us, and consisted of ammunition and stores and supplies of all kinds, to be issued to ships to provision, equip and repair them. A large amount of it was taken for the use of our naval vessels and was used upon them. Some of it remains in them to-day. The libellant claims all this property as prize.

Decision of this Court.

The statutes governing this subject have already been quoted in this brief. It is next appropriate to consider fully the authoritative decision of this court upon the question of land prize. This was the case of *Mrs. Alexander's Cotton*, 2 Wall. 404. Mrs. Alexander's cotton, her private property, was captured in the spring of 1864 by a joint expedition of the army and navy operating in Louisiana. A libel was filed for its condemnation as prize and Mrs. Alexander appeared as claimant. The court held the capture justified by legislation, as well as by public policy, though holding that the property could not be condemned as prize for the benefit of the captors. The conclusions of the court are as follows (pp. 421, 422):

"But this reasoning, while it supports the lawfulness of the capture, by no means warrants the conclusion that the property captured was maritime prize. We have carefully considered all the cases cited by the learned counsel for the captors, and are satisfied that neither of them is an authority for that conclusion. In no one of these cases does it appear that *private property* on land was held to be maritime prize; and, on the other hand, we have met with no case in which the capture of such

private property was held unlawful except that of *Thornshaven*. In this case such a capture was held unlawful, not because the property was private, but because it was protected by the terms of a capitulation. *The rule in the British Court of Admiralty seems to have been that the court would take jurisdiction of the capture, whether of public or private property; and condemn the former for the benefit of the captors*, under the prize acts of Parliament, but retain the latter till claimed, or condemn it to the crown, to be disposed of as justice might require. But it is hardly necessary to go into the examination of these English adjudications, as our own legislation supplies all needed guidance in the decision of this case.

"There is certainly no authority to condemn any property as prize *for the benefit of the captors*, except under the law of the country in whose service the capture is made; and the whole authority found in our legislation is contained in the act for the better government of the navy, approved July 17, 1862. By the second section of the act, it is provided that the proceeds of all ships and vessels, and the goods taken on board of them, which shall be adjudged good prize, shall be the sole property of the captors, or, in certain cases, divided equally between the captors and the United States. By the twentieth section, all provisions of previous acts inconsistent with this act are repealed. This act excludes property on land from the category of prize *for the benefit of captors;* and seems to be decisive of the case *so far as the claims of captors* are concerned." [*The italics are our own.*]

This case gives the authority of this court to three propositions:

(1) That any claim to distribution in prize must rest upon a statutory grant.

(2) That for land captures by United States forces in the spring of 1864 there was no such statutory grant.

(3) That under English prize law there was such a grant where the land capture was of public property of the enemy by a force exclusively naval.

Between the *Alexander* case and the present case there

are several important differences of fact: (1) The capture in that case was the result of a joint expedition of the army and the navy; but here it was by a naval force alone. (2) In that case it was of private property; but here of public property of the government of Spain. (3) The property in that case was not arms or munitions of war; but here it was arms, munitions and other material designed for naval use on the Spanish war vessels afloat.

A Change of Statute.

Between the capture of Mrs. Alexander's cotton and the capture of the Cavite naval station the older English rule of what constituted prize was restored in this country. On June 30, 1864, there was a general revision of the prize law; and the English rule was restored to the American prize practice. The changes made by the act of 1864 appear by presenting in parallel columns the provisions of the act of 1862, under which the Alexander case was decided, and the act of 1864.

Act of July 17, 1862.

(§ 2, 12 Stat. L. 606.)

"*And be it further enacted*, That the proceeds of all ships and vessels, and the goods taken on board of them, which shall be adjudged good prize, shall, when of equal or superior force to the vessel or vessels making the capture, be the sole property of the captors; and when of inferior force, shall be divided equally between the United States and the officers and men making the capture."

NOTE.—§ 2, 12 Stat. L. 606, is repealed in the act of 1864 by express reference thereto.

Act of June 30, 1864.

(§ 10, 13 Stat. L. 309; § 4630 R. S.)

"*And be it further enacted*, That the net proceeds of all property condemned as prize shall, when the prize was of superior or equal force to the vessel or vessels making the capture, be decreed to the captors; and when of inferior force, one-half shall be decreed to the United States and the other half to the captors."

(§ 33, p. 315.)

"*And be it further enacted*, That the provisions of this act shall be applied to all captures made as prize by the authority of the United States, or adopted and ratified by the President of the United States."

The act of June 30, 1864, now appears in the Revised Statutes, Title LIV.

Section 10 of the act of 1864 is conveyed verbatim into § 4630 of the Revised Statutes. Section 33 appears in the Revised Statutes as § 4613 in these terms:

"The provisions of this Title shall apply to all captures made as prize by the authority of the United States or adopted and ratified by the President of the United States."

Our position, accepting in full the decision in *Mrs. Alexander's* case, may thus be stated. It is conceded:

(1) There can be no right of captors in prize without a grant of the right by statute.

(2) Prior to 1864, there was no grant of prize to captors in property taken on land.

It is claimed:

(1) By the act of 1864, jurisdiction in prize and a share to captors was granted by statute in all cases whatsoever of "captures made as prize."

(2) This extends the prize law of the United States to all captures which can be classed by proper definition as "captures made as prize."

(3) The definition of "captures made as prize" must be sought in the cases in which the extent of the right of prize is decided.

(4) The history of prize law shows that the right of capture as prize, unless restricted by statute, has always extended to captures of public naval stores of the enemy on land by an exclusively naval force.

And from these premises we conclude that the naval stores captured by Admiral Dewey from the naval station at Cavite are prize, with the incidents given by the general statutes, including the jurisdiction of the prize courts, the regulated right of appropriation by the United States and the right of the captors to share.

These positions may be severally considered.

Effect of the Act of 1864.

What is the effect of these changes?

The provision in the act of 1864, covering all the ground covered by the provision of the act of 1862, would have repealed the latter by necessary implication. *Cook Co. Nat. Bk.* v. *United States*, 107 U. S. 527; *Pana.* v. *Bowles*, *ib.* 529; *United States* v. *Claflin*, 97 U. S. 546. But the Congress was so intent upon showing that § 2 of the act of 1862 was no longer to be in force, that it left nothing to implication. It repealed that section by express terms, substituting for it another widely different in terms. By this repeal and substitution it meant to make a different law, to establish a different rule to govern maritime prize. Wherein lay that difference? Analyzing the two sections, we see that each performs two functions. One function was to define the classes of property to which captors might lay claim as prize, and the other purpose was to declare when the captors should have all and when they should have only half the prize. As to the extent to which captors might claim, the effect of the two provisions is identical. It was to be determined by inferior or superior force. It was needless therefore for Congress to have passed any new provision, or to have repealed the old, unless there was some intent to re-define, by extending or limiting the classes of property subject to claim as prize.

The change made in the law can not be disregarded. The rights of captors, which in the act of 1862 had been limited to the whole of, or a share in, the "*proceeds of all ships*" *and cargoes* "*which shall be adjudged good prize,*" were now extended to the whole of, or a share in, "*the net proceeds of all property*" (and then follow the words) "*condemned as prize,*" which are intended to be the equivalent of the expression used in the repealed statute "which shall be adjudged good prize." The only difference there-

fore in the provision lies in the words entitling the captors in the one case to claim prize only in such *ships and their cargoes* as may be condemned, and in the other to claim prize in the *net proceeds of all property* that may be condemned; and there is no limitation.

If the Government can condemn enemy's property taken on land by a naval force, it is a subject of prize.

Mrs. Alexander's case makes it clear that this expression "*all property condemned as prize*" was intended to define the rights of captors. That case decides that the repealed words in the statute of 1862 constituted the only grant of prize rights for the benefit of captors. Hence it follows that the words substituted for them in the statute of 1864 are to be looked to as granting and defining the prize rights of captors now; and the only question left is, whether public property, consisting of arms, munitions and other material, captured on land by a maritime force as the result of maritime operations, may be condemned to the use of the United States. If so, the captors under the act of 1864 are entitled to share.

In the *Alexander* case the court held the lawfulness of the capture, on considerations of public policy, because of the peculiar character of the property—cotton—which was a great use to the Confederacy, although the cotton belonged to a private person; and while stating that its reasoning by no means warrants the conclusion that the property captured was maritime prize, it nevertheless cited the rule in the British Admiralty Court to have been that the court would take jurisdiction of the capture, whether as public or private property, and condemn the former for the benefit of the captors. Our case comes clearly within the English rule recognized in that case, for here the property captured on land was all public property, arms, munitions and other material of war belonging to the Government of Spain.

This reasoning is strongly reinforced by § 4613 of the Revised Statutes, which was § 33 of the act of 1864:

"The provisions of this Title shall apply to *all captures* made as prize by the authority of the United States, or adopted and ratified by the President of the United States."

To contend successfully that the libellant is not entitled to share in the proceeds of the war material captured by him at Cavite the Attorney-General must show that there is something in the statutes of Congress, which we have not found, or that there is something in our public policy that would prevent our Government through its navy, from capturing and condemning to its own use an enemy's naval supplies on land.

That Admiral Dewey had authority to make this capture there can be no doubt. This "authority" of itself would be sufficient, but it is also certain that the President in the language of this statute "ratified" his act. Our navy was allowed to use this material, much of it, on its vessels, and the Navy was afterwards directed to take, and did take, charge of the Spanish naval station and everything in it. The Navy is but the right hand of the President. Through Admiral Dewey and his fleet the President laid his hand upon the Spanish war material and ratified the capture by using the captured property for naval purposes. It would be strange now if, for the first time, that act of the President should be disavowed by the Attorney-General. No one heretofore has claimed that it was without the authority of the President.

The design of the legislation in 1864 was to extend the uniform rules of prize procedure and distribution beyond ships and their contents, to whatever else under the accepted rule of prize courts was to be considered as prize of war. This act was accompanied by

that of July 2, 1864, 13 Stat. L. 377, declaring that no property captured on inland waters of the United States, by the naval forces, should be regarded as maritime prize. These two acts, considered together, changed the captor's rights in prize as they then existed. Ships and their cargoes were, under the act of 1862, prize to their captors, whether captured on the high seas or in inland waters. Under the two acts of 1864 even ships and their cargoes taken in inland waters were not prize to the captors, but all captures made as prize by vessels elsewhere were distributed in prize, whether the prize captured was afloat or ashore. The test thereafter became, not whether the capture was a ship or cargo, but whether, under the accepted rulings of courts of admiralty, the capture was made as prize under due authority.

Objections to the Libellant's Construction.

Two objections have been made to the construction here advocated: the one in the able opinion of the court below; the other in the exhaustive brief of the attorney for the United States. The court below took the position that the words of §§ 10 and 33 are inadequate, in view of the other provisions of the statute, to accomplish the result claimed. With minute care the opinion analyzes other sections of the act of 1864 and calls attention to numerous references to vessels and their cargoes as the usual subjects of prize. Many provisions in the act, the opinion says, are applicable alone to vessels and cargoes and not to other property.

We can not think the objection well founded in the face of the words of the statute. In an extremely large proportion of cases, prize property consists of vessels and cargoes. Such is the property which in the nature of things is usually captured by an exclusively naval force. It is therefore not strange that Congress, in dealing with

prize, should have made many provisions applicable principally to vessels. The fact that it has done this in no wise restricts the substantive right of prize in other things. § 33 (R. S. § 4630) gives to captors the right to share in all "captures made as prize," whatever the nature of the property. When other things than vessels and cargoes are taken as prize, it is the duty of the courts, in carrying out § 33, to apply the rules of law laid down in the statute, as far as possible, *mutatis mutandis*.

Thus, for instance, in the condemnation of the *78 Bales of Cotton* (21 Fed. Cas. 1100) found floating at sea and apparently thrown overboard, it was quite impossible to comply with the terms of the statute here quoted by the learned judge (Rec. 53) from § 1, to secure the documents of the ship and cargo, including the log-book, and make an inventory of these, or to send "the master," one or more of the other officers, super-cargo, purser, or the agent of the prize as witnesses to the prize court, or to place the prize "under charge of competent prize master and prize crew and send it to court." Numerous other provisions of the act quoted in the opinion can not be applied to such a case as this, yet Judge Lowell had no difficulty in concluding that this cotton was subject to condemnation as prize. It was an exceptional case embraced within the general purport of the law and was not to be ruled out because provisions applying to the ordinary cases of capture of a vessel could not be applied.

In every respect in which the provisions of the prize statute may be applied to the property captured at Cavite, they should be applied. In view of the appropriation of the property by the United States, there is actually no difficulty in making this application. This condemnation may proceed in exactly the same way as if the property appropriated were a vessel and her cargo.

How Shall "Captures Made as Prize" be Defined?

Having thus established that the purpose of the use of the words "captures made as prize" is to extend the statutory incidents of prize, including the rights of captors, beyond the previously existing statutory grant, the next question is to determine how to define these words. The use of the words without definition necessarily presupposes some system of law to which they were familiar. Where then can inquiry be made to reach the definition of the term? There is no other source than the definitions contained in American and English prize cases. Here is a system of law familiar to the legislalative and judicial departments of the United States wherein these terms are used. As in the definitions of other technical terms of law arising in Constitution and statute, derived from the common law, reference is made to their common law meaning for their definition, so in this instance the term derived from the prize law of England must be defined by reference to previous decisions fixing its meaning.

Since the contention now made is that the restrictive terms of the act of 1862 were enlarged by the amendment of 1864 so as to bring again within the prize distribution all "captures made as prize," the English decisions, although unimportant under the self-limited act of 1862, are of immediate relevance in determining the wider scope of the act of 1864. Congress by this act put it beyond doubt that our Navy was entitled to all the privileges of prize which had been enjoyed under the British Crown.

The English law of prize, so far as it is adapted to the altered circumstances and conditions of the country and has not been modified by the proper national authorities,

is the law which governs the prize courts of the United States.

The Siren, 13 Wall. 389; *3 Hgs. Sugar* v. *Boyle*, 9 Cr. 198; *1,253 Bags of Rice*, Blatchf. Pr. Cas. 211, 18 Fed. Cas. 723; *703 Casks of Rice*, 27 Fed. Cas. 1027; *Brown* v. *United States*, 8 Cr. 128.

To determine what are "captures made as prize" we must therefore go to the rules settled in the English courts.

The weight of the argument of the learned attorney for the Government that, under the recognized rules of prize law, property captured on land by an exclusively naval force is not prize, is completely broken by the fact that the act of 1864, in being applied by § 33 to all captures made as prize, requires us to look to the recognized law of prize, particularly as expounded in the English courts, from which our prize authorities are chiefly drawn. If property captured under such conditions as here exist is according to the system of prize law under which our courts operate, to be condemned as prize, then the proceeds are subject, under the broad terms quoted, to distribution to the captors; if not subject to condemnation as prize, they are not subject to distribution.

Land Captures the Subject of Prize.

American Cases Declaring

In *Brown* v. *United States*, 8 Cr. 128, lumber belonging to a subject of Great Britain, in this country before the outbreak of the war of 1812, constituting the cargo of an American vessel, was unloaded in New Bedford and floated up a salt water creek where, at low tide, the ends of the timber rested on the mud, while it was secured from floating out by impediments in the creek. There

was no naval capture, but the District Attorney filed a libel against the lumber in prize as enemy's property, it having been pointed out by a private citizen. It is true the Supreme Court in an opinion delivered by Chief Justice Marshall reversed the decision of the court below; but the reversal did not question that the property of the enemy's sovereign captured on land by a naval force was a subject of prize. In the case reported below as the *Emulous*, 8 Fed. Cases, 697; 1 Gall. 575, Judge Story said:

"However this question may be as to the right of the admiralty to take cognizance of mere captures made on the land exclusively by land forces, as to which I give no opinion, it is very clear that its jurisdiction is not confined to mere captures at sea. The prize jurisdiction does not depend upon locality, but upon the subject-matter. The words of the prize commission contain authority to proceed upon all and all manner of captures, seizures, prizes and reprisals of ships and goods that are and shall be taken. The admiralty, therefore, not only takes cognizance of all captures made at sea, in creeks, havens and rivers, *but also of all captures made on land, where the same have been made by a naval force*, or by co-operation with a naval force. This exercise of jurisdiction is settled by the most solemn adjudication. (*Key* v. *Pearse*, cited in *LeCaux* v. *Eden*, Doug. 606; *Lindo* v. *Rodney*, Doug. 613 n.; *The Capture of the Cape of Good Hope*, 2 Rob. 274; *Stella del Norte*, 5 Rob. 349; *Island of Trinidad*, 5 Rob. 92; *Thorshaven*, 1 Edw. Adm. 102; *Capture of Chinsura*, 1 Acton, 179; *The Rebeckah*, 1 Rob. 227; *The Gertruyda*, 2 Rob. 211; *The Maria Franciose*, 6 Rob. 282.)"

In the case of *680 Pieces of Merchandise* (22 Fed. Cases, 252) the private property of an enemy ferried across a river in North Carolina and recently landed on a wharf, captured by a United States naval force, was held within the prize jurisdiction. This was decided under the prize act of 1862.

In the case of *1253 Bags of Rice*, Blatch. Pr. Cas. 211; 18 Fed. Cas. 723, decided in September, 1862, the United States District Court held:

"that enemy's property captured by a public vessel in an enemy's port, although it was when seized stored in a warehouse on land, near the water, was lawful prize."

The court, commenting on the decision in *Brown* v. *United States*, said:

"The decision upon the merits in *Brown* v. *United States*, went upon the principle that the enemy's property there seized was landed in this country before the war commenced between England and the United States, and that it was not liable to capture as prize in the absence of positive law authorizing its seizure. The majority of the court who adopted that decision did not controvert the decision of the circuit court, declaring the suit to be of a prize character, nor the historical and judicial fact that the practice of the United States courts is governed by the rules of admiralty law disclosed in the English reports. (*Glass* v. *Sloop Betsy*, 3 Dall. 6.) It is very clear that in England the prize jurisdiction does not depend upon locality, but upon the subject-matter. As is said by Sir William Scott, in *The Rebecca* (1 Rob. 227), this was a maritime capture effected by naval persons using a force subject to their use and distinguished from the ordinary land force subject to military persons, and was, therefore, a maritime prize." (1 Kent, 356.)

In the case of *282 Bales of Cotton*, Blatch. Pr. Cas. 304; 24 Fed. Cas. 435, decided December, 1862, the court said:

"The entire property was transported to New York on various vessels as means therefor could be procured. A great part of the cotton and rosin seized had been employed in building fortifications in defense of the town and the residue was owned by citizens of Newbern who aided the Rebellion by every means in their power and who are still in the Confederate army. Cannon were mounted by the enemy upon those defenses and there the

enemy defended the place upon the attack by the United States forces. Armed resistance was made to the taking of the town and many guns were fired on both sides. The capture of the place was made by the flagship *Philadelphia*, and other ships of the navy assisting her. This witness was on board one of the armed vessels and was engaged in the action. He says he is still sure that the entire property seized was the manufacture or production of Newbern. The place was, prior to the capture of this property, in a state of armed insurrection, as was notorious to all, until it was captured, as above stated. Two of the brothers Deeble are now in the Confederate army. The same leading facts are stated by the other two witnesses named in the libel and monition, and judgment by default was rendered against the 282 bales of cotton and 2,000 white oak staves and the quantity of yellow pine planks proceeded against in the suit.

"This property having all been captured during the war, and being at the time employed by the enemy in actual aid of hostilities waged against the United States, and being enemy property, it is decreed to be subject to condemnation and forfeiture to the libellants."

This decree was afterwards reversed on appeal to the circuit court, July 11, 1864, but the reversal was on the ground of want of jurisdiction in the district court, and did not question that enemy's property, captured on land by a naval force, was the subject of prize.

A very carefully considered case is that of the *United States* v. *269½ Bales of Cotton* (28 Fed. Cas. 307). This cotton was captured by a military force penetrating the State of Mississippi by water. The court by Miller, Cir. Jus. held, in an elaborate opinion reviewing previous cases of land capture, that the capture, being made by the army and not by the navy, could not be sustained as prize; accordingly the libel was dismissed. This case is entirely different from the case at bar, and the distinction is pointed out in the following clauses of this opinion (28 Fed. Cases, 307, 310):

"In every one of the cases where the court has sustained its jurisdiction in prize, it appears that the force making the capture, or co-operating in the act, was the naval arm, or, by its presence and active assistance, it contributed immediately in effecting the capture; that it operated from the sea; that the place captured was an island, town, or fortress, itself established to resist naval attack, and to support and succor naval expeditions, and accessible from the sea, so that the attacking squadron could directly bring to bear upon it the stress of its armament." * * *

No words could more accurately describe the case at bar than these. The opinion proceeds:

"However desirable it may be that, in a war between nations, there should exist a tribunal similar to the prize court, to administer the law of nations with reference to property captured on land, we find no warrant for asserting that any such authority exists in the admiralty courts of the United States, unless the circumstances of the capture show some element of a force operating from, or on, the water, which would bring it within the recognized rules on that subject.

These are all the American cases. There has been no decision that public property of the enemy on land is not the subject of prize. The decision of the Supreme Court in *Mrs. Alexander's Cotton* was based entirely on the terms of the act of 1862. The lower courts, we have seen, had held, even when that act was in force, that the question of prize on land was not affected by the statute but must be determined by the rules announced in many previous judicial decisions.

This court in *Mrs. Alexander's Cotton*, Justice Story in *The Emulous* and Justice Miller in *269½ Bales of Cotton* all agree that under general prize law, "captures made as prize" include public property of the enemy captured on land by an exclusively naval force.

It seems strange that in discussing the American cases stress should be laid by opposing counsel upon references by the commissioner who edited the second edition of the Revised Statutes as authoritative in interpreting their provisions. The duty of an editor in referring to adjudged cases is to insert possible references, not to exercise a judicial determination as to whether the case necessarily determines the meaning of the statute. The best editor is the one who gives the greatest number of approximate cases and who the most completely excludes his own opinion.

English Cases.

The opinion in *Mrs. Alexander's* case in the quotation already made, expressly states that public property captured ashore would, under British law, be condemned for the benefit of the captors.

There are numerous cases of land capture reported. The leading case is that of *Lindo* v. *Rodney* (2 Doug. 613). The property in question was captured on the Island of St. Eustatius, and a writ of prohibition was prayed from the King's Bench, to restrain the prize court. Lord Mansfield thus defined the issue:

"The only question then is, whether the goods being taken on land, though in consequence of a surrender to ships at sea, excludes the only prize jurisdiction known in this kingdom."

The decision of the law is so thorough, while the volume itself is so rare, that we transcribe almost the entire case (p. 616 *et. seq.*):

"In short, every reason which created a prize court as to things taken upon the high seas, holds equally when they are those taken at land. The original cause of taking is here at sea. The force which terrified the place

into a surrender was at sea. If they had resisted, the force to subdue would have been from the sea.

"Mr. Piggott candidly said it would be spinning very nicely to contend if the enemy left the ship and got ashore with the money, that this would not have been a sea capture. I agree with him, but I can not distinguish that case from this. Both takings were literally upon land. In both the prey is, as it were, killed at sea and taken upon land. Here the capture of the goods on land is the immediate consequence of a surrender at discretion to a sea force.

"Would the sum paid by capitulation upon land have made it a sea or land prize?

"*Cui bono*, should all this subtlety be spun when the reason for a jurisdiction to judge a capture at sea and such a capture at land is exactly the same?"

The court said further:

"Since the reign of Queen Elizabeth no special commission appears to have issued, but the Judge of the Admiralty, either by virtue of an inherent power, or the King's commission, or both, has solely exercised the jurisdiction of prize.

"I will conclude with three propositions:

"1. That so far back as particular cases can be traced, which is for a century, the Admiralty has judged of, and condemned, goods taken on land as prize, as well as goods taken on sea.

"2. That every common-law authority to be found on the subject allows and supports the jurisdiction.

"3. That the legislature has in many acts of Parliament recognized and referred to it as clear, certain and undoubted.

"4. 15 April, 1692. Sentence of Sir Charles Hodges, Judge of the Admiralty Prize Court, on goods taken on the plunder of a town.

"Captain Mann, commander of their Majesties' hired ships in the West Indies, goes on shore with several of his crew and pillages and plunders the inhabitants of a town, then in the territory and dominions of the French King, and brings off and carries on board his ship a con-

siderable quantity of goods, to the amount of £20,000, as is sworn by several witnesses, besides thirty negroes, worth £20 each. This pillage he keeps to himself, without making any distribution thereof to his followers or crew. The mariners, thinking they had a right to share thereof, have called him to account in a court of prize, and the questions which are made are:

"1. Whether this court has jurisdiction?

"2. Whether the mariners have a right to share?

"3. What that share shall be?

"1. As to the jurisdiction, which is two-fold, the Court of Admiralty and the Court of Prize: [Here there is a long argument to show that it may belong to the Court of Admiralty, as incident to the military authority of the Admiral, in time of war, upon descents as well as at sea, which is not material to be now stated. He then proceeds thus:]

"But go to the second ground of jurisdiction in this case, that it is (as it is) before the Court of Prize, where, by the plain words of the patent under the broad seal of England, it is evident enough that the court has cognizance of prize goods taken from the French, as well by land as by sea. It is, therefore, very clear to me that this court has jurisdiction."

He then proceeds upon the other two questions, as to the shares, but that is not material.

"This was followed, very soon after, by the cause which gave rise to the motion for prohibition in 1698 (*Brown* v. *Franklyn*).

"*1703, Vigo.* Captures under different circumstances. Many to this purport.

"*Adventure*, Trevor, Captain. The Queen against the goods in a certain schedule annexed, taken from the enemy at the port of St. Mary and St. Vigo, in the Kingdom of Spain, and put on board the sailing ship, and there, or in the hands of said Trevor, now or lately remaining, and against all persons in general. Much was undoubtedly taken on land and all condemned.

"*10 July, 1745, Peyta.* Sentence of condemnation to the

King. Several purses of money and jewels amounting to £30,000 and upwards, taken and seized as plunder, in the town of Peyta, being a town in the Spanish West Indies, in the Kingdom of Spain, from the enemies of the Crown of Great Britain, were rightly and duly taken by the officers and mariners of His Majesty's ships (naming them, etc.)

"*4 Feb. 1746.* Plunder taken from the Island of St. Bartholomew and condemned in Antigua, viz., 170 negro and mulatto slaves, and divers other goods, wares and merchandise, seized and taken from the Island of St. Bartholomew.

"*27 April, 1759, Savannah.* Taken by Sir Hyde Parker's fleet, goods and effects (specified) taken in boats and craft *and on shore.* Many claims and restitutions.

"*27 June, 1759.* Plunder taken at Senegal.

"*28 March, 1763, Havana.* Upon another state of facts. The *Tyger* and effects on board surrendered, by capitulation, with the town—treaty *on land.*

"These cases show that for a hundred years, jurisdiction has been professedly, notoriously and quietly exercised, which leads to the second proposition, that this exercise does not rest on acquiescence only, but

"2. That every common law authority to be found on the subject, allows and supports the jurisdiction.

"*Brown and Burton* v. *Franklyn, the King's Proctor, Scacca.* H. 10 W. 3 Carth. 474.

"Brown and Burton, masters of two ships belonging to the East India Company, take a French ship, and cargo, and money, upon land. They had no letters of marque. The King's proctor upon the usual monition got a sentence of condemnation against the whole, as perquisite of Admiralty, and then proceeded upon the ground of this sentence, against Brown and Burton for an account.

"They moved for a prohibition, suggesting that the goods and merchandise were taken *upon land* in the *East Indies*, and that they were no parties to the sentence, never heard, and ought not to be bound.

"The last was an objection upon the eternal principles of natural justice, but immediately removed when the nature of the proceeding *in rem* came to be examined.

"The ground which remained was their being taken upon land. That the court had no jurisdiction, the sentence was null and void, that the subsequent proceeding was illegal, and must have been prohibited.

"But it was insisted by the counsel against the prohibition, that '*prize or no prize*' was a matter not triable at common law, but already appropriated to the jurisdiction of admiralty.

"The court concurred in this proposition, and, therefore, denied the prohibition.

"This is a judgment in point, and the attempts which have been made to show, that no ingenuity can distinguish it, and Lord Chief Baron Comyn draws a general conclusion and maxim of law from it: 'If a sentence be in the admiralty, for a ship or goods, as prize, a prohibition does not go upon a suggestion, that it was not prize, or *that it was acquired upon land.*' (Comyn's Digest, Title Admiralty.)

"But, in 1794, there is a more solemn and more elaborate judgment, by Lord Chief Justice Lee, a very able, and a very strict common lawyer; viz: in *Key and Hubbard* v. *Vincent Pearse*, 31 Jan., 1742. I was counsel in it. It was argued, and could only be argued, as a mere question of law, just as if it had arisen in Westminster Hall upon a capture in the river Thames, within the body of a county.

"The colonies take all the common and statute law of England, applicable to their situation and condition. The courts of law prohibited the court of admiralty, just as the courts of Westminster Hall do here.

"I had a full note of it. But luckily Lord Chief Justice Lee, having taken time to consider, he brought with him notes of the opinion he was to deliver, which notes we have in his own hand.

"(Here his Lordship read the opinion of Lee, Chief Justice, verbatim as it is set forth *supra*, pp. 606–608.)

"Nothing can be clearer than the principle laid down by him. The question '*prize or no prize*,' is the only boundary line; and not the locality of land or sea, or port within the body of a county within the realm.

"3. That the legislature in several acts of parliament,

has recognized and referred to this jurisdiction over goods taken on land as prize. The prize act of 17th and 29th Geo. II contains a clause that the Lords of Admiralty shall grant a commission, at the request of the owner, to the captain of any ship, 'For attacking or taking, with such ship, or with the crew thereof, or any place or fortress *upon land;* or any ship or goods belonging to or possessed by, etc.'

"The statutes of 19th George III, meaning to express the same thing, has used more words to effectuate the grant of the property to privateers, but takes the jurisdiction for clear and certain.

"Subsequent acts follow this.

"Upon these authorities there can be no doubt. We, none of us, ever had any.

"If the question had been doubtful, arguments from utility and public convenience ought to have turned the scale. It could answer no good end, and must produce inextricable mischief, to captors, claimants and the state, if goods taken upon land by ships, should not be within the prize jurisdiction."

In *Mitchell* v. *Rodney* (2 Brown P. C. 423), the same capture was considered on an appeal from a judgment based on a special verdict in an action for damages brought against the commanding officer of a fleet. It was held that the plaintiffs were not entitled to recover on the ground that the prize court had jurisdiction over the capture made by a naval force, although on land. The reporter, in giving the reasons urged in behalf of Rodney and on which the House of Lords decided for him, says (p. 429):

"On the other side, the only question made in the cause was whether the goods being taken on land, though in consequence of a surrender to ships at sea, gave the common law courts in this country a jurisdiction in the cause. It is established on the authority of a regular series of decisions that the question of 'prize or no prize' can not be tried at common law, but must be tried before a judge of the high court of admiralty;

and that the jurisdiction depends not upon the locality or upon the parties, but upon the nature of the question; which is such as not to be tried by any of the rules of common law but by a more general law, the law of nations, administered by forces best adapted to the subject of its jurisdiction, and the interests of all parties. That if the capture had been rightfully made, the captor can not apply to the common law to give him security in his possession or to enable him to dispose of it; the common law knows no process to make people say whether they have or have not a right; he must hold himself at his peril without the power of using it, answerable for decay or damage, and liable to separate law suits from every individual who can set up a claim. That if it had been wrongfully made the common law could restore nothing upon the affidavit of the party; each individual must bear the whole burden of his lawsuit, though the same question might have been tried and determined in favor of every individual; and neither party can have the benefit at common law of that sort of evidence which the subject-matter of the litigation in many cases absolutely requires, and which a court of admiralty is properly constituted to receive. That all the cases upon the subject exclude the jurisdiction of the common law and many of them directly declare that jurisdiction to be in the judge of the high court of admiralty; and in the latter judgments it has been held that even if there were no such previous authorities and the jurisdiction now was not to be directed by the uniform decisions of former cases, but was to be made for the first time, there can be no case in which that maxim '*Quod inconveniens est non est licitum*' so often repeated by Lord Coke, would deserve more attention. That the judge of the court of admiralty sits under an authority which does not limit his jurisdiction to the sea, but is general to all manner of captures, seizures, prizes and reprisals, and is the only prize jurisdiction known in this country. The statutes of 13 and 15 Richard II and 2nd Henry IV have no reference whatever to this case; and captures made equally within the limits mentioned in those acts as if they had been made on land (as in

ports, havens, etc., within the realm) have constantly been tried within the prize court of admiralty. That so far back as particular cases could be traced which was for a century, the admiralty has judged of and condemned goods taken on land as prize, as well as goods taken on sea; every common law authority on the subject allows and supports the jurisdiction. And that the legislature has in many acts of Parliament recognized and referred to it as clear, settled and undoubted."

In *Lord Camden* v. *Home*, 4 T. R. 386, the court says:

"Whatever is taken by any of the King's subjects from the enemy in the course of naval operations is prize and appertains to the King, either *jure coronæ* or as a droit of admiralty, according to the circumstances. If taken by a private ship without any commission from the King, the prize belongs to him as a droit of admiralty. If the ship had a commission, only one-tenth of the prize belongs to the King as droit of admiralty, and the rest is the property of the owner of the privateer."

It is held *In re French Guiana* (2 Dods. 151) that money received from the Portuguese Government as a result of a joint expedition of the British and Portuguese, resulting in the capture of Cayenne, the money being the value of public property there taken on land, should be condemned as prize.

The converse of the present case is *The Rebeckah* (1 C. Rob. 227.) A statement of this case is given in *United States* v. *269½ Bales of Cotton* (28 Fed. Cas. 306) as follows:

"The case of *The Rebeckah*, 1 C. Rob. Adm. 227, decided in 1799, was a contest between the admiralty and the captors. The circumstances were, that the vessel on putting into St. Marcou, for safety, was fired at from the fort, and struck her colors, and was taken by a boat's crew sent out from the fort. St. Marcou was a small island, occupied exclusively as a naval station for naval supplies, and for the temporary accommodation of ships

of war. The question was between the admiralty claiming the vessel as droit of admiralty and the captors. Sir William Scott, in his judgment, holds it a maritime capture, because, although made from the shore, 'the whole force, such as it is, upon this little spot, is entirely subservient to these vessels, and for their use, and for no other purpose, as the certificates declare. Such a place, so selected and so employed, is hardly to be considered as anything else than as a part or appendage of the naval force; it is a sort of stationary tender, rather attached to and dependent upon these vessels, than having the vessels attached to and dependent upon it. This peculiar character of the place distinguishes it most essentially from the case of a land fortress possessed by a land garrison. The capture then was affected by naval commissioned persons, using a force immediately subject to their use; and from its peculiar circumstances sufficiently naval in itself to be distinguished from an ordinary land force, subject to military persons. It is a maritime capture, effected regularly by a maritime force, and in a spot where the right of the admiralty had not yet commenced upon the thing itself at the time of the surrender.' And he clearly indicates that, had the force by which the capture was effected been under the command of the military instead of naval officers, it would have been a droit of admiralty. He says: 'Upon this subject I entirely accede to what has been laid down, that a capture at sea, made by a force upon the land (which is a case certainly possible, though not frequent,) is considered generally as a non-commissioned capture, and inures to the benefit of the lord high admiral. Thus, if a ship of the enemy was compelled to strike by a firing from the castle of Dover, or other garrisoned fortress upon the land, that ship would be a droit of admiralty, and the garrison must be content to take a reward from the bounty of the admiralty, and not a prize-interest under the king's proclamation.' And again, he holds that, even when naval forces land and use arms of the military, and fortifications by which to effect the capture, the result is the same.

"This, then, is the case of a capture by naval forces of property on the same footing as if it were afloat."

The same learned judge further considers the other English cases on the same subject and thus states them (28 Fed. Cas. 306):

"*The Island of Trinidad*, 5 C. Rob. Adm. 95, decided in 1804, was a claim on behalf of several ships to share in the capture, among other things, of the island and its dependencies. Without entering into any consideration of the principle here involved, and occupying himself with a question whether the vessels were present at the close of the conflict, the same learned judge pronounced some of them entitled to share in the capture of the island. This, then, is the case of a capture by naval forces operating from the sea, of property on land.

"The capture of the *Chinsurah*, Acton 179, decided in the high court of appeals in 1809, by Sir William Grant, was the case of the capture of the Dutch town and fort by a vessel of the squadron, and a detachment of the East India Company's troops. Previous to the capture, the Dutch East India Company had entered into many contracts with neighboring merchants for supplies of certain articles of merchandise. The governor of the place, among others, had entered into such contract with one Halsey, and had on account thereof advanced to him £23,200. At the time of the surrender this contract remained unperformed, and the question was presented, whether it should be condemned for the English company or for the naval forces, each seemingly claiming the whole fund. The court condemned the whole property generally as prize to the crown, to be distributed. From this sentence both parties appealed. The sentence was affirmed. The reasons for the judgment on the point before us here are not assigned. But it is plain that the case was one of conjunct capture, which was effected by operations from the sea, and by the aid of naval forces, and, as it would seem, all under the vice-admiral's command.

"Nor does the case of *The Thorshaven*, Edw. Adm. 102, throw much light on the question. It is enough to say here that, whichever command should be deemed the captors, the capture was by naval forces operating in naval warfare.

"In *The Buenos Ayres*, 1 Dod. 28, the single clause with which Sir William Scott commences his judgment shows the circumstances of the case, and how summarily the question of jurisdiction is disposed of by him. He says: 'This is a proceeding originating in the capture of the Spanish settlement Buenos Ayres. A claim is set up by Captain Honeymoon and the other officers and crew of his Majesty's ship the *Leda*, to share as joint captors in the proceeds of the property captured at that settlement.'"

It is to be observed that these cases are not decided upon the special terms of statutes or royal grants, but upon general principles of prize law.

Justice Story, in an elaborate note added by him to 2 Wh. as an appendix, entitled, "Additional Note on the Principles and Practice in Prize Causes," says:

"As preliminary to the subject it may be observed, that the ordinary prize jurisdiction of the admiralty extends to all captures made on the sea, *jure belli* (*The Two Friends*, 1 Rob. 271, 284); to captures in foreign ports and harbors (*Lindo* v. *Rodney*, Doug. 613, note); to captures made on land by naval forces and upon surrenders to naval forces either solely or by joint operations with land forces (*Lindo* v. *Rodney*, Doug. 613, note; *Chinsurah*, 1 Acton 179); and this, whether the property so captured be goods, ships or mere choses in action (*ib*)."

These cases establish with great clearness the conclusion that, under the English law, public property of the enemy captured on land by naval forces was subject to condemnation as prize, a conclusion reached by this court in the case now chiefly relied on in opposition to this libel.

Nothing is more dangerous than to accept general definitions as controlling particular cases not in contemplation at the time. Thus learned counsel takes a special foot-note to show that Lord Stowell's definition of prize as "goods taken on the high seas" is inaccurate in not

including property taken in inclosed waters. The true source of accurate definition is in cases involving the point of controversy. We have shown that when the right to land captures has been litigated in court, these have been held to be prize if captured by a naval force alone. The definition, accurate in general, must then be subject to this extension also.

So too booty is stated in general definitions to be land captures, but the cases show that booty is land captures effected by the army with or without naval aid. Adjudicated cases thus give an authoritative exception to the otherwise correct definition.

The Ancient Rule Restored.

Although the right of prize in land captures of public property by vessels of the United States was taken away by the restrictive terms of the act of 1862, this ancient and well-recognized right was restored to them by the extension of prize distribution in the act of 1864 to "all captures made as prize." Thus were rights always existing under British law and supposed by many American judges to belong to the American Navy, granted by Congress to remain in force until all distribution of prize money was abolished by the act of March 3, 1899, § 13, 30 Stat. L. 1007.

The scope of the word "prize" is so long settled and well recognized, that it can only be considered as having been used in a technical sense when employed in the framing of this statute.

Bishop on Written Laws, p. 127, says:

"Whatever is newly created by statute draws to itself the same qualities and incidents as if it had existed at common law. In other words, the statute is to be interpreted after the rules and incidents of the common law. (*The William Gray*, 1 Paine, 16)" and again, on page 22,

—"When an act of Parliament creates a new interest, it shall be governed by the same law that like interests have been governed by before." (*Lane* v. *Cotton*, 12 Mod. 472.)

The qualities and incidents attaching to the word "prize" under the uniform decisions of the prize courts, continue attached to the word when, by statute in 1864, a new and enlarged interest was given to the captors in property taken as prize. There must be considered as annexed to these new interests the same qualities, incidents and controlling law as went with the word before the statute was enacted. In the present case, where the statute refers to the interest of the captors, it annexes to those newly-created interests all the rules of construction governing the subject-matter, that an unbroken line of decisions has established. If this be not so, then the act would limit the interests of the United States equally with those of the captors to water-borne property, and under such a construction of the statute, no provision whatever could be considered as having been made in the act for the judicial disposition of such property as might have been captured on shore.

It is not presumable that such a result was intended by this legislation. By repealing the act of 1862, which restricted the subjects of prize in which captors could share to "ships and vessels and the goods taken on board of them," and enacting that they should share in "the net proceeds of all property condemned as prize," it is clear that Congress meant to give captors a right to share in the net proceeds of all property that the Government could condemn as prize, which, under the decisions we have quoted, would undoubtedly include this public property captured ashore by a naval force operating from the sea against a place accessible from the sea.

The Land Capture the Notable Achievement.

The fact which gives the chief permanent glory as a military achievement to the victory of Manila Bay is not the defeat by the American vessels of the Spanish vessels, but the capture of the shore defences. It is but the second time in naval history when shore batteries were attacked and captured by a naval fleet without the assistance of an army. This fact is stated by Admiral P. H. Colomb, R. N., in his authoritative work, "Naval Warfare":

"The fall of Chagres (March 24, 1740) after an attack by bombardment alone, comes upon us now, we may observe, as in some sort a novelty in naval war. We have had captures of forts by the attack of land forces without any direct assistance from the ships; we have had them when the attack by ships had been made subsidiary to that by land forces; and we have seen the captures made as at Gibraltar and Porto Bello, where the main attack has been by the ships and the land attack has completed it. We have also had bombardments where no surrender has followed. This fall of Chagres appears to be the first instance of capture following simple bombardment, but the course of history shows us that the result was exceptional, and depended on the geographical situation of the place and the moral fibre of the garrison defending it."

The allowance of prize money on account of property captured ashore is an allowance to Admiral Dewey and his fleet for the very attack which will, in future history, mark the unusual character of the victory.

The Effect of the Treaty.

This property at the Cavite Naval Station was captured May 1, 1898. On December 10, 1898, the treaty of peace was signed at Paris, and the treaty proclaimed on April 11, 1899. During the whole of that time, it is clearly

shown by the evidence, the property in the Cavite Naval Station was used by the United States naval forces, and in large part had been, at the last date, actually consumed in repairs to United States naval vessels. By article five of the treaty (30 Stat. L. 1757), the following provision was made:

"The time within which the evacuation of the Philippine Islands and Guam shall be completed shall be fixed by the two Governments. Stands of colors, uncaptured war vessels, small arms, guns of all calibres, with their carriages and accessories, powder, ammunition, live stock, and materials and supplies of all kinds, belonging to the land and naval forces of Spain in the Philippines and Guam, remain the property of Spain."

The Government apparently concedes that the property consumed for military purposes prior to April 11, 1899, is not affected by this provision, but maintains that the rest of the property is not the subject of prize in any event. It appears, however, by a manuscript return from the Navy Department filed in the court below but not brought up in the record on appeal, that the small portion of the property then remaining in the Naval Station was transferred to Spain in January, 1901, under the provisions of this article, long after this libel was filed. If any part is exempt from condemnation, it must be limited to this property actually restored.

The Government bases its claim to the exemption of this property on the ground that it is analogous to the release of captured vessels prior to decree of condemnation. Authorities will doubtless be produced showing that a nation whose vessels capture prizes must, for public reasons, reserve the right to release the prizes in derogation of the rights of the captors. The question has been disputed, Sir William Scott saying, in *The Mercurius* (1 C. Rob. 80):

"It has been declared by high authority that the interest of prize is vested in the captor, and that captors may against the wish of the crown proceed to adjudication."

Later, in the case of *The Elsebe* (5 C. Rob. 173), decided in 1804, he states correctly the grounds of his conclusion that it was within the power of the crown to release prior to adjudication.

We would not contend to the contrary or that the same power is not vested in the President of the United States.

The same distinguished judge, however, in *The St. Ivan* (Edw. 376), decided in 1811, thus declared the limitation which should be imposed upon that power:

"It is true that it has been held in this court, as well as in the courts of common law (for there have been decisions directly upon this point), that the King may, for reasons of state, release a prize against the interest of the captors. The captors bring in their prizes subject to such interposition on the part of the crown, but it is of very rare occurrence, and speaking with all due reverence, ought to be of rare occurrence, and only under very special circumstances; as, for instance, where the detention of the vessel may be detrimental to the general interests of the country. In such cases there can be no serious doubt of the authority or of the intentions of the crown."

The reason why release should be a very rare occurrence is self evident. The rights granted by law to the captors as a reward for their enterprise and gallantry ought not to be taken away from them by a retroactive order of the executive. Rights vested to this extent should be treated as final.

Here the facts show no such release in derogation of the captors' rights as was approved in *The St. Ivan*.

The naval stores now actually in the vessels of the United States or otherwise used in service were not released and

must be condemned as appropriated. The real question is as to the property claimed as prize but shown by the list filed in this court to have been actually returned to Spain. We contend that the return came too late. This property was all taken into the possession of the United States naval authorities and treated by them as the property of the United States long before this return. When so taken and treated by the United States the rights of the captors vested. The same statute that provided for the United States to take and appropriate to its use the arms, munitions of war and other materials also provided that upon those things being taken and appropriated it was to pay over to the captors their share of the value.

The title to the property having passed out of the Spanish Government into the United States in trust for the captors has, by the appropriation of the United States, passed to the United States itself. If, after that, the United States grant by treaty or act of Congress any portion of this property to Spain, this is a gift by the United States of its own, not of the captors' property. The captors' right vest upon the appropriation by the United States.

The statute indeed directs the appraisal of such property and requires the deposit of its value subject to the order of the court. These things were not done in this case; the property was not appraised and the money has never been deposited, because of a question whether it was prize. But if the United States had, prior to April, 1899, obeyed the law and deposited the value of these goods to the order of a court of the United States, we submit to the court whether, after that date, the United States could give the property to Spain, or to any other power, or to any private individual, in derogation of the captors' rights.

Opinion by Court Below Upon Property Captured Ashore.

Our contention is that § 4630 of the Revised Statutes, which is § 10 of the Act of June 30, 1864, 13 Stat. L. 306, providing that the captors shall share in the net proceeds of all property condemned as prize, gives to the captors the right to share in the net proceeds from this property, if the same is by law subject to condemnation as prize to the United States.

The opinion of the court below (Rec. 151), admits that in two cases it was decided by eminent jurists that property captured on land by a naval force operating from the sea is lawful prize. One of these was a decision by Justice Story, in the United States Circuit Court, and the other was by Justice Betts, in the District Court. But it is claimed that these cases are discredited, because afterwards overruled. First calling attention to a case that squarely maintains our proposition, and which has never been overruled, viz: *103 Casks of Rice*, Blatchford's Prize Cases, 212, 213, we remark as to the other two cases which were reversed: In that decided by Justice Betts, viz: *282 Bales of Cotton*, Blatchford's Prize Cases, 304, there is no published report of the decision of the court above, but there is a note that the case was overruled in the Circuit Court for want of jurisdiction; and in the volume of Federal Cases where this case is reported there is a note that no copy of the opinion of the Circuit Court can be found.

In the other case, viz: that of the *Emulous*, where the opinion was rendered by Justice Story, he was reversed in an opinion rendered by Chief Justice Marshall, the case being reported as *Brown* v. *United States*, 8 Cranch. 110. But Chief Justice Marshall does not question the principle laid down by Justice Story, that the admiralty takes jurisdiction of captures made on land by a naval

force. He puts his reversal on the ground that the property (which was not captured by a naval force) was in our country before the commencement of hostilities, holding that "the power of confiscating enemy property is in the legislature, and that the legislature has not yet declared its will to confiscate property which was *within our territory on the declaration of war.*" (*The italics are ours.*)

He concedes that war gives to the sovereign full right to take the property of the enemy wherever found, and points out that while the mitigation of this rigid rule, which the humane and wise policy of modern times has introduced into practice, may more or less affect the exercise of the right, it can not impair the right itself. Nowhere did he question the proposition that enemy's property captured upon enemy's land by a naval force after hostilities had commenced, was a proper subject of prize.

In the present case, every reason that would have justified a capture had the property been afloat, applies to this capture made ashore. The property was public property belonging to our enemy on his territory and was intended *for use in naval operations against us.* The capture of the supplies at the enemy's only navy yard in the East was as effective a blow at his naval establishment as the sinking of ships, and the immediate use of many of those supplies by our fleet was as beneficial to our navy as if those supplies had been captured afloat.

As to captures by naval forces, whether afloat or ashore, there has not been the same mitigation of the ancient rule, and in the growth and development of international law not the same demand for such mitigation, because where property is captured by a naval force, subject to condemnation before a court, claimants have a right to be heard and are not exposed to the same hardships as in the case of captures by land forces, termed booty,

where title passes immediately upon capture without any condemnation. It should be the policy of every government that recognizes the right of naval captures at all, whether afloat or ashore, to hold strictly to the rule that property so captured shall be condemned by a competent tribunal, this as a guaranty against abuse of the right of capture. Wharton on Captures says, p. 278:

"The jurisdiction of prize courts extends as well to goods taken on land by a naval force, or in subsequent operations by a naval force, as to property captured on the waters."

The opinion of the court below (Rec. 151) next refers to the case of *269½ Bales of Cotton* (1 Wool. 236) as sustaining the negative of our proposition, and also to a quotation from Justice Gray, in *Paquete Habana*, 175 U. S., p. 711, as, while probably *obiter* in that case, a very weighty outgiving in favor of the negative of the proposition.

As to the case of *269½ Bales of Cotton*, the capture *was not by a naval force at all, but was made by the army*, and the property could not possibly have been a subject of prize.

As to the quotation from Mr. Justice Gray the Supreme Court at the same term at which this decision was rendered, and speaking through the same lamented Justice, in the case of *Oakes v. United States*, 174 U. S. 786, said:

"By the law of nations, as recognized and administered in this country, when movable property is in the hands of the enemy, used or intended to be used for hostile purposes, the title passes to the captors as soon as they have reduced the property to formal possession; but when such property is captured by naval forces, a judicial decree of condemnation is usually necessary to complete the title of the captors."

The court below holds that the first nine sections of the prize act of June 30, 1864, show that only ships and their cargoes are a proper subject of prize, and further on, relative to capture of cascos, even holds that capture of ships is restricted to those that carry ship's papers.

In considering these nine sections as defining the subject of prize, it must be borne in mind that all these several sections bear upon the bringing of property into a prize court. It is only natural that the word "prize" should refer almost invariably to a ship and what may be brought in it. It is to be noted that where the act refers to property subject to condemnation, but not to be sent into court, the language broadens.

§ 27 of the act, which has reference solely to property that can not be brought in, but which is nevertheless a subject of prize, states that wherever—

"any captured vessel, arms, munitions or other material, shall be taken for the use of the Government—[without anylimitation as to where taken]—before it comes into the custody of a prize court, it shall be surveyed, appraised and inventoried * * * and the survey, appraisement and inventory shall be sent to the court in which proceedings are had."

Then follows the next section, 28, prescribing the proceeding before the prize court in cases of this kind.

This § 28 authorizes proceedings to treat as subject of prize any vessels, arms, munitions, or other material that may be taken for the use of the Government (without any restriction whatever as to the place where the same may have been taken). The right to institute these proceedings is granted, first, to the Secretary of the Navy, and if he fails to proceed within a given time, then the captors may move.

The Constiution, Article VIII, § 11 provides that—

"Congress shall have the power * * * to make rules concerning captures on land and water;"

and § 27 of the act under consideration providing for the condemnation of "any captured vessel, arms, munitions or *other material*" "taken for the use of the Government," without limitation as to the place of capture, makes a rule for captures both on land and sea. Beside this rule Congress provided that district courts should have jurisdiction (R. S. § 563):

8. "Of all civil causes of admiralty and military juristion * * * and of seizures on land and water not within admiralty and military jurisdiction. And such jurisdiction shall be exclusive, except in the particular cases where jurisdiction of such causes and seizures is given to the circuit courts."

9. "Of all proceedings for the condemnation of property taken as prize in pursuance of section fifty-three hundred and (seventy-six) eight. Title, Insurrection."

§ 5308, above referred to, designated certain property, if intended for certain uses, as a lawful subject of prize, wherever found, and the proceedings had under that statute during the civil war and intended to be had were mostly, if not entirely, where the property had been captured ashore.

The law of 1864 is extant to-day, so far as defining what this Government shall treat as prize. The provision in the naval appropriation act of March 3, 1899, § 13 (30 Stat. L. 1007), taking from captors the right to share in prizes, and which is as follows:

"And all provisions of law authorizing the distribution among captors of the whole or any portion of the proceeds of vessels, or any property hereafter captured, condemned as prize, or providing for the payment of bounty

for the sinking or destruction of vessels of the enemy hereafter occurring in time of war, are hereby repealed."

does not relieve the United States of its responsibility as a civilized nation to condemn property which Congress has made the subject of prize. The only change made by this provision is that the *captors could not share*.

So long as Congress provides that where the Government appropriates to its own use in time of war captured arms, munitions and material, *before they are brought into a prize court*, it may have three months in which to select a district to institute prize proceedings, or, upon failing to act, claimants—though excluding captors—may move monition to show cause why proceedings shall not be commenced, or institute original proceedings, just so long is the value of arms, munitions and material which have been captured and appropriated to to the use of the Government a subject of prize. Congress has so determined, and the Government does not take the property "*jure reipublicæ*, as contradistinguished" from the right to have the capture adjudicated in a prize court.

We respectfully submit that the words *jure reipublicæ*, as used in the decisions, are misapprehended by counsel. We have never had in this country rights of admiralty, and captures, therefore, always have been and still are made by right of the Republic, but that does not mean that the property captured is not prize where Congress has subjected it to adjudication in a prize court. As the law stands to-day, claimants have rights, and either the United States or they can institute proceedings.

There can certainly be no reason why arms and munitions of war intended for naval use against us should not, when captured by our navy in naval operations, be taken and appropriated to the use of this Government, whether taken on land or on a vessel; but there is every reason

why property so appropriated should be adjudicated by a prize court, and Congress very properly so decided by §§ 27 and 28.

§ 29 of the act of June 30, 1864, in reference to salvage, does not indicate an intention to confine the subject of prize to vessels and things taken upon them. The language used is:

"That when any vessel or other property shall have been captured by any force hostile to the United States and shall be recaptured, and it shall appear to the court that the same had not been condemned as prize before its recapture," etc.

The opinion of the learned judge below (Rec. 155 contends that the words "all property condemned as prize," in § 10, necessarily refers to the property described as prize in the preceding sections; that the section is only a provision for distribution of net proceeds after condemnation, and that its wording "gives added certainty to the claim that prize means 'ship,' or 'vessel,' or 'cargo.'"

The net proceeds for distribution arise either from the sale of the prize property brought into court, or from the value of captured property, not necessarily a "ship," or "vessel," or "cargo," and *appropriated by the Government to its own use*, which value the Government is directed to deposit with the Assistant Treasurer of the United States. Unless this appraised value be net proceeds, there would be no object in authorizing the Government to come into court to condemn it, or failing to come, authorizing the claimants. We do not suppose that it would be contended that if arms or munitions of war had been taken from a vessel and the value paid into the Treasury, that value would not be net proceeds in which the captors could share. Likewise the value of any property which Congress provided for condemnation of, upon the property

being appropriated by the Government, is net proceeds in which captors can share.

We do not contend that there was anything in § 10 that was intended to extend the commonly accepted meaning of prize, but we do contend that that section was meant to give captors the right to share in the net proceeds of all property the Government could condemn as prize, whether such net proceeds arose from the sale of property brought into court or from the appraised value of property appropriated before being brought in.

The opinion states (Rec. 155, 156) that the construction adopted is strengthened by contemporaneous legislation and cites as evidence of this the following proviso from the captured and abandoned property act of March 12, 1863 (12 Stat. 820):

"That such property shall not include any kind or description which has been used, or was intended to be used, for waging or carrying on war against the United States, such as arms, ordnance, ships, steam boats, or other water craft, and the furniture, military supplies, or munitions of war."

The closing section of the captured and abandoned property act seems to have been overlooked when the above proviso was cited, which is § 7, "That none of the provisions of this act shall apply to any lawful maritime prize by the naval forces of the United States." Notwithstanding this, however, the proviso does not sustain the view in support of which it is cited, for there was a special reason for its enactment, in that the property excepted by it from the captured and abandoned property act was under another law already prize—the act March 6, 1861, 12 Stat. L. p. 319. True it was not prize in which a naval force if it captured the property ashore could share, because Congress had not given the navy that right. It was prize property as to the United

States, Congress having by the act of 1861 provided that property taken when used or intended to be used in waging war against the United States should be lawful prize and condemned before a prize court. It did not give the Government title without such proceedings, as it did where property which was not used or intended for use in making war against the United States was taken under the captured and abandoned property act. It is thus strange that this contemporaneous legislation could be thought to indicate an intention on the part of Congress to exclude property taken on land from being subject to condemnation as prize.

Congress throughout the civil war recognized the wisdom of having arms, munitions and war materials intended for use against the United States condemned as prize, wherever taken and by whomsoever taken, as shown by the act of August 6, 1861, Stat. L. p. 319. There was no legislation until 1863 authorizing the appropriation of property of this character to the use of the Government before condemnation, but at that time Congress empowered either the Secretary of the Navy or the Secretary of War to appropriate before condemnation any captured vessels, arms or munitions of war, or other material for the use of the Government, but provided that the value of the property so appropriated should be deposited in the Treasury of the United States, and also for the prize proceedings to follow. See § 2 of the act further to regulate proceedings in prize cases and to amend various acts of Congress in relation thereto, approved March 3, 1863, 12 Stat. L. 759.

This act clearly recognized that the property taken under it should be treated as prize, just as the act of 1861 did, though neither of those acts had granted any rights to captors. In 1864 Congress passed a law entitled "An act to regulate prize proceedings," and § 35 expressly

repealed the act of March 3, 1863, and enacted as a substitute for § 2 of that act above referred to, that whenever any captured vessel, arms, munitions or other material were taken for the use of the Government before coming into the custody of the prize court, that the value of the same should be deposited as provided for under the act of 1863, and prize proceedings follow; but it also provided by § 10 of the act of June 30, 1864, that captors might share in the net proceeds of all property condemned as prize, and gave in § 28 a right to captors to institute condemnation proceedings wherever arms, munitions and material had been appropriated to the use of the Government.

Thus were the rights of captors to share expressly extended to property, or the value of the same, which all throughout the war the Government, as far as its own rights were concerned, had treated and condemned as prize. There is no more in the act of June 30, 1864, to show that Congress intended to limit the rights of captors to property taken afloat than there is to show that it intended to limit the right of the Government only to such arms, munitions and material as were captured afloat. The argument that it does goes on the idea that the Government takes the property when ashore *jure reipublicæ*, and yet does not take it *jure reipublicæ* afloat. There is no such distinction. The Government has always taken all captured property *jure reipublicæ*, whether afloat or ashore. Congress recognized the desirability of having all captured property, intended for use against the Government, condemned in a prize court. When it authorized the appropriation of such property before condemnation, even before it gave captors any rights to share, it provided for adjudication of the property. When in 1864 it granted to captors the right to share in all property condemned as prize it continued to provide for adjudi-

cation after the property was appropriated. If this property taken ashore would be subject of prize on the election of the United States to commence prize proceedings, it must also be subject on claimants' election. Otherwise the Government by merely doing nothing could prevent the adjudication of the rights of captors or claimants, for they can do nothing until the Government has had its three months in which to select a district for the institution of proceedings. That the Government itself could not, under this act, institute prize proceedings to condemn this property when captured ashore is the only hypothesis on which the property could not be considered as subject of prize. Sections 27 and 28 require that when taken it should be condemned, and those sections, considered in connection with § 10, give to captors a right to share in the proceeds, whether they or the Government commence proceedings.

§ 7 of the act of July 2, 1864, is likewise cited as contemporaneous legislation strengthening the view held by the court. That section provided that property seized or taken on the inland waters of the United States by naval forces should not be regarded as maritime prize, but should be delivered to the officers of the court, as provided in that act, and also in the act of March 12, 1863. § 7 was clearly intended merely to prevent conflicts between the Navy and the authorities enforcing the captured and abandoned property act and the other act authorizing seizure and capture of property in the insurrectionary States. It certainly does not show that Congress intended to restrict the subjects of prize in a subsequent war with a foreign power.

The Government's Objections.

Counsel for the Government contends that the Government takes this property "*jure reipublicæ*, in contradistinc-

tion to prize," urging in support of this that the Government has never recognized by statute property on land as a subject of prize, and that the courts have never so recognized it.

Why learned counsel uses the term *jure reipublicæ* as an opposing term to "by right of maritime prize" can not be understood. This court uses it in the passage quoted in the Government's brief from *The Siren*, 13 Wall. 392, in no such sense: "The United States take captured property not as droits, but strictly and solely *jure reipublicæ*." This is true whether by statutory grant a portion of the proceeds is given to the captors, as under the act of June 30, 1864, or as under existing law (act of March 3, 1899, § 13, 30 Stat. L. 1007), the entire proceeds go to the United States. The repeated addition of the phrase "*i. e.* without condemnation" to the words "*jure reipublicæ*" throughout the brief shows a definite misapprehension of these words, although so exactly defined by this court.

That public property of the enemy taken on land by an exclusively naval force was prize under British admiralty decisions, is established upon the authority of this court in the *Alexander* case. This is expressed, it is true, in the course of the argument and is not essential to a decision of the case; but it is a deliberate conclusion and was reached in the case after a very elaborate review of the authorities. An examination of the briefs of counsel in this case, as reported, will show that nearly all of the known authorities on the subject were cited and considered by the court.

IV. CASCOS AND WRECKING BOATS.

There were captured certain cascos or cargo boats, and two wrecking boats. The court below decided that these were not the subject of prize. Its opinion, as well as the contention of counsel for the Government, was

based upon the idea that only vessels having ship's papers and capable of being taken into a prize court are a proper subject of prize. Independently of that question, this property having been taken and appropriated to the use of the United States, what has hitherto been said relative to the taking and appropriating of property ashore applies and need not be repeated. These cascos and wrecking boats we think should properly be included as vessels. A vessel is defined as follows:

"A ship; a craft of any kind; usually a larger craft than a boat, but in law often construed to mean any floating structure."

Century Dictionary.

But the Revised Statutes of the United States themselves (§ 3) define a vessel to include every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

Vessel, in maritime law:

"A ship, brig, sloop, or other craft used in navigation. 1 Brulay Paty tib. 1 p. 100. The term is rarely applied to any water craft without a deck; 3 Mass.; but has been used to include everything capable of being used as a means of transportation by water."

27 La. Ann. 607.

"A floating elevator towed from place to place, and used to transfer grain, has the characteristic of a vessel; Bened 506. So of a scow adapted only for use in port in carrying ballast to and from vessels, having neither steam power nor sails nor rudder; and moving by steam tugs. 3 Fed. Rep. 411; so of canal boats, *id;* so of a scow built for carrying a steam shovel worked by the steam engine of the scow; 30 Fed. Rep. 206; and a barge having no sails, masts or rudder, and used only for the transportation of bricks, suitable only to be towed by a tug; 36 *id.* 607; so of a floating scow fitted with steam appliances for deepening channels; 40 Fed. 353; a steam dredge

53 *id.* 607; 30 *id.* 206; 83 *id.* 840; a barge and scow, 61 *id.* 502; *id.* 476. The means of propulsion makes no difference. 8 Savoy, 211. An open boat is not a vessel, 5 Mass. 120; nor a raft; 14 Fed. Rep. 236; nor a canal boat, 5 Wend. 564."

2 Vol. Bouvier Law Dictionary, p. 1193.

Under prize law of the United States a ship includes a torpedo steam launch. 113 U. S. 747.

Ship.—"A vessel employed in navigation."

Ben Ad. 215.

"Comprehends every description of vessel navigating on any sea or channel, lake or river, to which provision R. S. Title Merchant Marine may be applicable."

4612, 48 Fed. Rep. 312; 119 U. S. 629; 46 Fed. Rep. 204.

"The code declares that commercial partners are those who are engaged in 'carrying personal property for hire in ships or other vessels.' In this sense we understand vessel to mean any structure which is made to float upon the water for purposes of commerce or war, whether impelled by wind, steam or oars."

Chaffe & Bros. v. *Ludeling, et al.* 27 La. Annual Reps. p. 611.

"Nor is there any valid objection to the jurisdiction in this case growing out of the character of the scows, or the uses to which they were adapted and applied. They were adapted only for use in port, and were in fact used in carrying ballast to and from vessels. When taken from vessels by them the ballast was carried to some point on the bay and dumped on the shore. They had neither steam power nor sails nor rudder, and were moved about by steam tugs. In these respects they were not unlike canal boats and barges, although these have rudders. Canal boats are now treated as vessels. While these scows are employed in carrying ballast to or from a vessel, that ballast must be considered as their cargo. They are, as it seems to me, properly to be considered vessels,—instruments of commerce and navigation,—a contract for the repair of which is maritime, because it has relation to

trade and commerce, and 'some connection with a vessel employed in trade.'"

Endner v. *Guco*, 3 Fed. Rep. 413.

"A steam dredge is a vessel within the meaning of the law, and, as such, subject to a maritime lien for supplies. *Huismann* v. *The Pioneer*, 30 Fed. Rep. 449. A barge having no sails, masts or rudders, and used only for the transportation of bricks, suitable only to be towed by a tug. *Disbrow* v. *Walsh Bros.* 36 Fed. Rep. 607. A dredge and her scow are to be treated as one concern, and are subject to libel in admiralty for wages."

Starbuck, 61 Fed. Rep. 512.

"A steam dredge, without motive power, etc. is a vessel and within the admiralty jurisdiction."

Saylor et al. v. *Taylor*, 77 Fed. Rep. 476.

"Are dredges and scows vessels, or goods, wares and merchandise, and subject to the duty imposed by Congress on the latter description of property? This is the only question presented. While it has not been directly passed upon by the courts, it has, I think, been indirectly decided. Dredges and scows are held to be water craft; they are intended for and subject to use only upon the water, and are consequently so shaped and constructed as to be navigated. That they are without independent means of propulsion is immaterial. In this respect they resemble barges and similar vessels. They are held to be within the jurisdiction of admiralty, subject to the laws of navigation generally, and to the provisions of our statutes relating to the subject."

The International, 83 Fed. Rep. 840.

It is urged that because this property was claimed as prize by amendment the claim was an afterthought and should not be sustained. Whether it was an afterthought could in no wise affect the validity of the claim itself, but as the opinion of the court below, as well as counsel for the Government, weighs the fact that the claim was put in by amendment, we state here facts of which the court will take judical notice, that the original libel in this case was filed in July, 1899, before Admiral Dewey

and the ships under his command had as yet returned to the United States. Counsel here did not have full returns of all the property taken and did not feel justified in delaying the filing of the libel, since this could be amended at any time before final decree, to wait for these full returns. After opportunity occurred to talk with the Admiral and the officers under him, it was found that these cascos and floating derricks had been taken, and the libel was accordingly amended to include them.

The argument is made that, because these cascos were owned by native Filipinos they should not be considered a subject of prize, and the Government's brief says:

"These small craft were not the property of people with whom the United States was at war, but apparently of native Filipinos who while claimed by Spain as its subjects, were not really on the Spanish side in the war."

That native Filipinos at the time of this capture were subjects of Spain is too plain a proposition to need argument, as is likewise the question that the property of the subjects of any country with whom we are at war is enemy's property. As said in the *Alexander Cotton Case*, 2 Wall. 422, "this court can not inquire into the personal characters and dispositions of individual inhabitants of enemy territory." The fact that the Government took and treated this property as prize makes it too late for it to set up such a defense here. These cascos, as a matter of fact, were cargo boats, used in the commerce of a populous city, and correspond, as far as use for commercial purposes is concerned, with such craft as lighters, found in the harbors of our cities. Counsel do know as a fact that later on, after the arrival of the army, when we were in full possession and the Government needed cascos, the cascos then available were owned and controlled by, and

their rental secured from, persons in Manila engaged in commercial business.

The contention that these cascos should be exempt rests primarily upon an alleged analogy to fishing smacks. The reason why fishing vessels of a certain character and under certain circumstances, are exempt from capture is clearly expressed in the case of the *Paquete Habana*, 175 U. S. 708:

"This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent states that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.

"The exemption, of course, does not apply to coast fishermen or their vessels if employed for a warlike purpose, or in such a way as to give aid or information to the enemy; nor when military or naval operations create a necessity to which all private interests must give way.

"Nor has the exemption been extended to ships or vessels employed on the high sea in taking whales or seals or cod or other fish which are not brought fresh to market, but are salted or otherwise cured and made a regular article of commerce."

From the above it will be noted, (1) that the decision draws a distinction between fishing vessels employed merely to give a livelihood to the poor fishermen and those employed in catching fish as a regular article of commerce, and (2) that no fishing smacks are exempt "when military or naval operations create a necessity to which all private interests must give way."

These two exceptions destroy entirely the analogy between these cascos and fishing vessels. These cascos were cargo boats plying in and around the harbor of a populous city. Their use was undoubtedly for commercial purposes. They correspond to lighters and craft of that kind found in our own harbors, used in loading and unloading vessels engaged in commerce. That fact alone would make it clear that they are not exempt from capture. The exception to the rule of liability of enemy's vessels to capture can not be extended beyond the limits of that rule as declared by authorities on international law.

But even if they were similar to such fishing vessels as are exempt, this was certainly a case where naval operations created a necessity to which all private interests must give way. Admiral Dewey with his fleet was in the harbor of a nation with whom we were at war; he was over four thousand miles from home; he had no base of supplies from which he could secure lighters or any vessels needed for loading or unloading or for transferring these stores from the arsenal at Cavite to his ships. There was certainly a military necessity for the taking of these cascos.

The defense recognized in the decision quoted is one pertaining to the owners of the vessels claiming to be prize; it can not be made by the government. These cascos were taken as prize; they were, as prize, appropriated to the use of the government. The government has the vessels, as the result of libellant's acts, and can not, with them in actual possession, declare that the captors can not share because the possession is *ab initio* unlawful. The statute of 1864 certainly made the rights of the captors co-extensive with the rights of the government in the captured property.

This same reason applies to the floating derricks. They

were property afloat appropriated by the government as prize. They were water-borne and were unquestionably a subject of prize.

As to the argument that these boats should not be considered as prize because they did not have ships' papers, could not be sent to a prize court, and so on, these provisions are all directory; they do not define prize; they only apply when the prize is of a character that can be sent in with its ship's papers. It was customary all through the civil war, and has been customary in proceedings arising out of the war with Spain, to condemn as prize water-borne property, without question as to whether or not it could be sent in to a prize court. And this is recognized by special statutory provisions in R. S. §§ 4615, 4625.

Then, too, the inability to take the boats into a prize court of the United States is only because of the distance across the Pacific. Congress could have erected a prize court in Manila at any time after the treaty of Paris was ratified.

SUMMARY.

It is respectfully submitted that the decision below should be affirmed:

(1) As to the three gunboats, because they were captured and not destroyed;

(2) As to the property taken from sunken vessels because, being in the possession of the United States as the result of libellant's capture, the statute gives him and his officers and men a share in their value.

And that it should be reversed:

As to the stores taken ashore and the cascos, because the United States now holds them as "captures made as prize, and, so holding them, can not deny a share to the captors."

THE STOVELL APPEAL.

The appeal of Stovell brings up a question of distribution. The same question came before the Court of Claims in settling the distribution of the bounty money for the vessels destroyed, under Revised Statutes § 4635. Stovell's petition was dismissed with an opinion by the Court of Claims (36 C. Cls. 392). The decision of the Court of Claims was followed by the Supreme Court of the District of Columbia in the prize cause. By stipulation, the record in the Court of Claims was made the record in the Supreme Court of the District of Columbia, so far as it bears on the *Stovell* case, and that has been incorporated in the record on appeal in this court. The findings of fact by the Court of Claims are therefore upon the very record which is in this court. These findings and the opinion of the court state the facts so clearly and enunciate the law so conclusively, that in lieu of an argument, we submit these as representing our views on the issues here involved.

Findings of Fact of the Court of Claims.

I.

The claimant was captain or master of the original crew of the *Nanshan*, which was a British merchant vessel, purchased by Admiral Dewey, at Hong Kong, under authority from the Secretary of the Navy, in April, 1898. The vessel was not commissioned, but was registered as an American steamer, and the original crew was shipped in the American merchant service. The original crew was employed to handle the ship; and on account of what might occur at Manila Bay, the officers and men were promised and received double the wages they had theretofore been paid in the British merchant service. The crew was not rated in the United States Navy, and

the double wages were not the rates of pay fixed by the President under the Revised Statutes, § 1564. This arrangement as to the employment and the payment of the crew was the result of an agreement made by Admiral Dewey with the original officers of the *Nanshan*. A monthly list of the names and wages, in Mexican money, of the original crew, was made by the original captain or master, the aggregate amount of which was received by him from the pay inspector of the fleet in a lump sum, reduced to the value of American gold, which money said original captain distributed to his original crew.

Admiral Dewey placed on board a naval officer, Lieut. Ben. W. Hodges, four enlisted men, and two mounted one-pounder guns. The master of the *Nanshan* remained on board, and under him were shipped the merchant seamen as a crew. The officer exercised control over the ship and gave all orders concerning it. The *Nanshan* did not approach the Spanish fleet in the battle of Manila near enough to enable her guns to be of service. The guns were mounted on her as a protection from boat attacks, but not for offensive operations.

II.

At the time and during the battle of Manila Bay, Lieut. Commander Ben. W. Hodges had been detailed as aforesaid with four men of the navy for duty on said vessel, and was so engaged on said vessel as above stated, during the time of the battle of Manila Bay. The ship, at the time of the battle, was loaded with 3,000 tons of coal. The duty of the naval captain on board said ship was to take general charge of the vessel, execute all orders from the flagship, controlling the movements of the *Nanshan*, and to obey all orders given by the Admiral, direct or through his flag lieutenant, in general to control the

movements of the *Nanshan*, but not to interfere with internal discipline in such things as loading and discharging cargo, but to leave those matters to the captain of the ship, who was the captain of the ship before she was bought by Admiral Dewey.

III.

The *Nanshan* crossed the China Sea with the fleet and was a part thereof. She kept her position in the fleet, and after the Admiral stopped the fleet at Subig Bay he ordered her commander to come on board the flagship for his final orders, who afterwards returned to the *Nanshan*. The fleet started in single column, the *Olympia* leading, followed by the *Baltimore*, the *Raleigh*, the *Petrel*, the *Concord*, the *Boston*, the *McCullough*, the *Nanshan*, and the *Zafiro*, passing the forts in that order. The forts on the south side of the channel fired upon the fleet as they were entering Manila Bay, and the *Nanshan* passed through that fire. The *Nanshan* was in reserve during the action, within signaling distance. The ship had on board two 1-pounders, taken from the flagship *Olympia*, and 360 rounds of ammunition for these guns; also eleven Lee rifles from the *Raleigh*, and eleven revolvers, with a suitable amount of ammunition; also two boats rigged out ready to lower and pick up men if it was found necessary to do so. The *Nanshan* was a heavy ship, being loaded to the underwriters' mark with coal. The *Nanshan* was not at any time within effective range considering the guns she carried, nor directly attacked.

IV.

At the time and during the battle of Manila Bay the *Nanshan* was between four and five miles from the Spanish vessels that were engaged in that action. She was within

signal distance of the fleet that effected the destruction of the Spanish vessels, but was not in such condition as to afford effective aid, her guns not being able to produce any effect upon the Spanish vessels. She was distant from the American fleet at time of battle about three miles. She was ordered to lay off in the bay clear of the fleet. She could not have been brought within effective range because her guns were too light. The *Raleigh* was detailed as a special guard in case the reserve division was attacked separately by the enemy. The *Raleigh* had orders to go to its assistance in case of necessity.

V.

The *Nanshan* was purchased by the United States in April, 1898, under the following order:

"WASHINGTON, *April 6, 1898.*

"DEWEY, *Hong Kong:*

"Purchase immediately *Nanshan* and one more vessel for supplies. Charge special appropriation. * * * Enlist for special service, if possible, one year, unless sooner discharged, the crew of. Detach and order assume command of each an officer. Arm if possible. * * *

"LONG."

"HONG KONG, *April 19, 1898.*

"SECRETARY OF THE NAVY, *Washington:*

"*Zafiro* and *Nanshan* have not been commissioned. Have been registered as American steamers. Commissioned officers command each vessel; four men; armed. Original officers and men have been shipped merchant service. Both vessels have been cleared for the Bonin Islands, North Pacific. I believe present status preferable in the event of hostilities. They can obtain supplies and coal in Shanghai for men-of-war.

"DEWEY."

At the time and during the battle of Manila the *Nanshan* was between 4 and 5 miles of the Spanish fleet en-

gaged in that action. She was within signaling distance of the fleet that effected the destruction of the Spanish vessels, but was not in such condition as to afford effective aid, her guns not being able to produce any effect on the Spanish vessels. She was ordered to lay off in the bay clear of the fleet. She could not have been brought within effective range, because her guns were too light.

The determination of the question at issue in this proceeding is to settle, by construction of the statute which regulates the distribution of prize money, the right of the claimant. § 4632 defines the vessels which are to share in the distribution of prizes, and the same law which determines that distribution determines the distribution in this case. The section provides as follows: "All vessels of the Navy within signal distance of the vessel or vessels making the capture under such circumstances and in such condition as to be able to render effective aid, if required, shall share in the prize." § 4614 defines what is understood by the law as "vessels of the Navy." "The term 'Vessels of the Navy,' as used in this title, shall include all armed vessels officered and manned by the United States and under the control of the Department of the Navy."

Did the *Nanshan*, at the time of the battle of Manila, have impressed upon her the conditions and characteristics required and recognized by the statute? In order to participate in the result of that victory, she must have been in such a condition as to enable her to render effective aid, if it was required. The findings of fact show that she was not in such condition. Her condition indicates that she was not intended or expected to participate with the belligerent force employed in the battle; but, upon the contrary, that she was placed in reserve so as to be safe in case of certain conditions which might arise as an incident of the engagement. She was performing the functions of a collier, and as a matter of fact at the time of the battle needed protection, rather than having the qualifications of aggressive warfare. Does she come within the definition of § 4614, in being an "armed vessel, officered and manned by the United States?" The crew she had on board was not of the United States Navy,

never having been enlisted, but simply employed by proper authority to perform manual labor, incident to the necessities of the fleet, which sailed from Hong Kong, and which finally destroyed a part of the Spanish navy. Can she be included in the term "armed vessels" simply because she had on board two 1-pounders and some small arms? Courts must look at substantial and not technical conditions in determining the rights of parties. It can not be inferred from her armament that she was eqipped for any purpose of aggression, and that whatever protection she had from her armed condition was for the purpose of defence rather than attack.

Her condition, instead of having the power and qualifications of aggression, had the marked characteristics of helplessness.

Although she was within signal distance of the vessels making the capture, she was not in such a condition as to be able to render effective aid, and she was not kept in the relation which she sustained to the engagement for strategic purposes, but for the purpose of protection to herself and the incident protection of the rest of the fleet as the source of their coal supply.

The claim of the captain and crew of the *Nanshan* to share in the bounty is further embarrassed by the difficulty arising under the fifth clause of § 4631, in which it is provided, "After the foregoing deductions the residue shall be distributed and proportioned among all others doing duty on board, including the fleet captain, and borne on the books of the ship in proportion to their respective rates of pay in the service."

In this case the crew of the *Nanshan*, outside the detailed men of the Navy, were borne on the books of the ship as merchantmen. Their rates of pay were the result of a contract made by the Admiral of the Navy, at the time they were employed at Hong Kong, as laborers and not as soldiers or enlisted men.

They were paid from a lump sum given to the claimant by the proper officer of the Navy, in pursuance of the terms of the contract then subsisting between them and the United States. The distribution contemplated by the statute is to be made "according to their respective pay

in the service." § 1569 provides, "The pay to be allowed petty officers, excepting mates, and the pay and bounty upon enlistment of seamen, ordinary seamen, firemen and coal heavers in the naval service shall be fixed by the President: *Provided*, That the whole sum to be given for the whole pay aforesaid, and for the pay of officers and for the said bounties upon enlistments shall not exceed for any one year the amount which may in such year be appropriated for such purposes."

By the provisions of this statute it is the duty of the President to fix the pay of seamen, firemen and coal heavers in the naval service, and such pay is to be regulated in each year by the amount which may in such year be appropriated for such purposes. In this case no rate of pay had been established by the President, and the basis upon which the men engaged in the alleged military service during the naval engagement is wanting, but it is sought to base the ratio of such compensation upon the pay which is the result of a contract, and not upon the pay provided by Executive orders. Being by law without rates of pay in the service, can the rate of pay established by contract perform the function of the rate of pay established by Executive order?

It has been decided in this court in the Manila Bay case and also in the Santiago case that "additional pay" is the full compensation for detention, and does not increase pay allowances. Respective rates of pay refer to the regular rates of pay, thus giving construction to §§ 1572 and 1422, on the theory that the rate of pay forming the basis upon which the distribution is to be made is the regular pay in the Navy.

On the argument and in the brief of counsel the court's attention is called to the case of the *Ceylon*, Mulac (1 Dod. p. 105), in which it is held, in substance, that the employment of a vessel in the public military service of the enemy, by those who have competent authority so to employ her, "is a sufficient setting forth for war" under the prize act, though the vessel may not be furnished with any formal commission of war. The facts upon which that decision is predicated are briefly as follows:

Conclusion of Law.

Upon the foregoing findings the court determines as a conclusion of law that the claimant is not entitled to share in the bounty, and the Auditor is instructed to omit him from the distribution.

Opinion of the Court of Claims.

WELDON, J., delivered the opinion of the court:

The claimant filed a petition, No. 3892, to share in the bounty money as incident to the destruction of the Spanish fleet in Manila Bay on May 1, 1898, and the court is asked to instruct the Auditor as to the right of the claimant to participate in that bounty.

In the case of *Admiral Dewey* v. *The United States* (35 C. Cls. R. 172) it was found by the court that on May 1, 1898, an engagement took place between the following vessels of the United States Navy, to wit, the *Olympia*, the *Baltimore*, the *Boston*, the *Raleigh*, the *Concord*, the *Petrel*, the *McCullough*, the *Nanshan*, and the *Zafiro*, and the following vessels belonging to the King of Spain, to wit, *Reina Cristina*, the *Castilla*, the *Don Juan de Ulloa*, the *General Lezo*, the *Marques del Duero*, *Argos*, *Velasco*, the *Isla de Mindanao*, the *Don Juan de Austria*, *Isla de Cuba*, the *Isla de Luzon*, and two torpedo boats. In that proceeding no contest was made as to the ships which participated on the part of the United States in that engagement; but it is now insisted by counsel appearing for other vessels that the *Nanshan*, notwithstanding the finding of the court in that case, has no right to participate, and that the crew thereof is not to be taken into account in the distribution of the money arising from that destruction. The question in the case of Admiral Dewey was not as to whether certain ships participated, but whether the Admiral, as the commander of the American fleet, was entitled as the basis of his compensation to the sum of one hundred or two hundred dollars as represented by the men on board of the Spanish ships; and the parties now in interest in this proceeding were not called upon, and did not litigate as to what American seamen

or soldiers were entitled to share in the bounty as the crews of the different ships.

This being a proceeding to distribute the fund among the persons entitled to the same, excluding the commander of the fleet, it is competent and proper for the court now to consider upon the evidence in the case the rights of the claimant as against the officers and men of other ships participating in the Manila engagement. The findings of fact in that case are not conclusive upon the rights of the parties in this case. It may be that upon further consideration the finding may be changed, that finding having only the force of an interlocutory order, and the subject-matter of this dispute still being before the court. It was held in the case of *Sampson* v. *The United States* (36 C. Cls. R.—) that the order made in said case was subject to change until a full disposition of the matter.

The facts found by the court show, that the claimant was captain or master of the original crew of the *Nanshan*, which was a British merchant vessel, purchased by Admiral Dewey at Hong Kong, under authority of the Secretary of the Navy, in April, 1898. The vessel was not commissioned, but was registered as an American steamer, and the original crew was shipped in the American merchant service. The crew were employed to handle the ship, and the officers and men were promised and received double the wages they had theretofore been paid in the British merchant service. They were not rated in the United States Navy, and the double wages were not the rates of pay fixed by the President under authority of Revised Statutes, § 1564. The arrangement as to the employment and payment of the crew was the result of an agreement made by Admiral Dewey with the original officers of the *Nanshan*. A monthly list of the names and wages of the crew, in Mexican money, was made by the original captain or master, the aggregate amount of which was received by him from the pay inspector of the fleet in a lump sum, reduced to the value of American gold, which money the captain distributed to his original crew.

Admiral Dewey placed on board a naval officer, Lieut.

Benj. W. Hodges, and four enlisted men, and two mounted 1-pounder guns. The master of the *Nanshan*, Capt. Edwin F. Stovall, remained on board, and under him were shipped the seamen, as aforesaid. The naval officer exercised control over the vessel and gave all orders concerning her. The merchant captain was merely his executive officer, being familiar with the crew. The *Nanshan* did not approach the Spanish fleet during the battle of Manila near enough to enable her to be of any service. The guns were mounted on her as a protection from boat attacks, but not for offensive operations. At the time and during the battle of Manila Lieut. Benj. W. Hodges had been detailed as aforesaid with four men of the Navy for duty on said vessel, and was so engaged on said vessel as above stated at and during the time of the battle. The *Nanshan* was loaded with 3,000 tons of coal. The *Raleigh* was detailed as a special guard in case the reserve division was attacked separately by the enemy. The duty of the naval captain on said ship was to take general charge of the vessel, execute all orders from the flagship controlling the movements of the *Nanshan*, the handling of the guns, and the signaling, but not to interfere with the internal management and discipline of the ship and such things as loading and discharging cargo.

After the vessel was bought by Admiral Dewey, the *Nanshan* crossed the China Sea with the fleet and was a part thereof. She kept her position in the fleet, after the fleet stopped at Subig Bay the Admiral ordered her commander to come on board the flagship for his final orders, afterwards returning to the *Nanshan*. The fleet started in single column, the *Olympia* leading, followed by the *Baltimore*, the *Raleigh*, the *Petrel*, the *Concord*, the *Boston*, the *McCullough*, the *Nanshan*, and *Zafiro*, passing the forts in that order. The forts on the south side of the channel fired upon the fleet as they were entering Manila Bay, and the *Nanshan* passed through that fire. The *Nanshan* was in reserve during the action, within signaling distance. She had on board two 1-pounders taken from the *Olympia*, with 360 rounds of ammunition for those guns. Also eleven rifles from the *Raleigh*, and eleven revolvers with a suitable amount of ammunition, and two

boats rigged ready to lower to pick up men if it was found necessary to do so. The *Nanshan* was a heavy ship, being loaded to the underwriters' mark with coal.

An East India ship had been captured by French frigates and carried to the Isle of Johanna, where she was refitted and supplied with two additional cannonades and a French crew consisting of seventy men. From that island she was conveyed by the French to the Isle of France. On her arrival off that place she was anchored by the British frigate *The Nereid*, and, having fired several shots in return at the frigate and fort, she passed on to her anchorage at another point. While lying in that port she was attacked by the British squadron, when, with the assistance of other French ships, she succeeded in repelling the attack and destroying the British squadron. She was then taken to another port, dismantled, and fitted out as a prison ship for English prisoners of war, in which condition she was found at the time of the capture of the island. The question was whether this ship was "sufficiently set forth for war" to come within the prize act, which directs restitution of British ships recaptured from the enemy, unless they shall have been "set forth as ships or vessels of war by the enemy."

The court held in that case, by Sir William Scott, that she came within the phraseology of the statute "set forth as ships or vessels of war by the enemy."

The question presented and decided in that case is not the question submitted to the consideration of the court in this proceeding. The question is not whether the vessel belonged to the United States as a part and parcel of the war equipment, but whether, in the battle of Manila, she was so constituted, equipped, and conditioned as to come within the letter or spirit of the statute entitling vessels to participate in the bounty, upon the theory that they participated in the battle.

The claimant in this case and his crew were not in the military service of the United States. They had not been enlisted or hired to perform and discharge military duty. They were not identified with the naval force, in a military sense, which fought the battle and won the victory at Manila.

It would be an unjust discrimination against the men who were in the service, subject to all the restrictions and requirements of that service, and all the dangers incident to that battle, to allow the demand of the claimant, who did not undertake, by any obligation, to perform the duties and discharge the functions of a soldier.

The men who participated in that battle and who contributed to its success as a great American victory are entitled to share the glory and participate in the bounty of the engagement, without having that glory lessened or dimmed, or that bounty impaired by men who were simply employed to perform the manual functions of a ship, which, in the hour of danger to the forces of the United States, was an impediment instead of a help in the prosecution of belligerent operations against the enemy.

For these reasons the Auditor will be instructed not to allow the claim of the claimant in the distribution of the proceeds due to the men and officers of the United States Navy who fought and won the battle of Manila.

Conclusion.

For these reasons we ask that the decree of the court below dismissing the petition of Stovell be affirmed.

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